TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1913.

No. 271.

KATE C. ARCHER, PETITIONER,

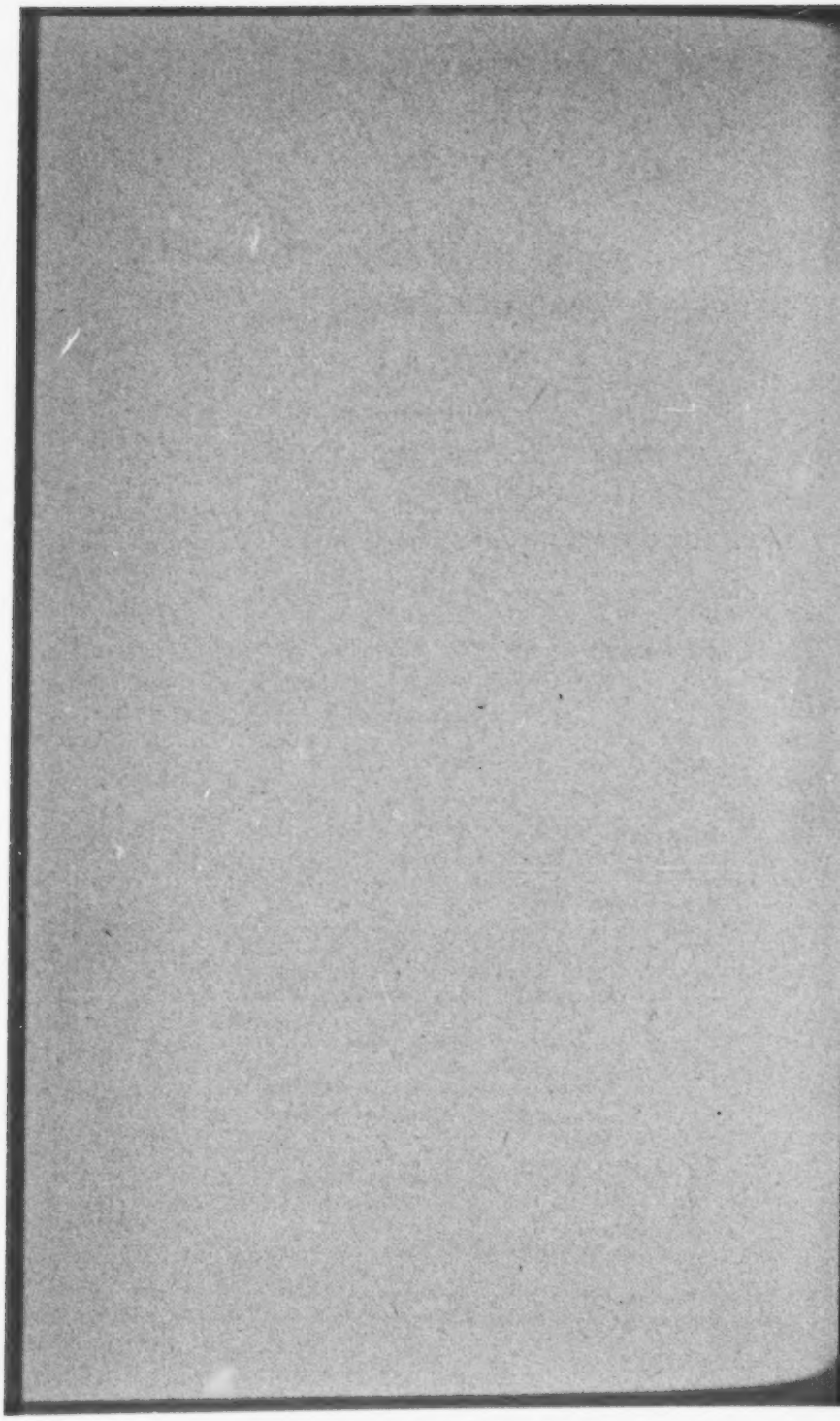
vs.

THE GREENVILLE SAND AND GRAVEL COMPANY ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

PETITION FOR CERTIORARI FILED JUNE 7, 1912.
CERTIORARI AND RETURN FILED JULY 15, 1912.

(23,246)



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INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., OCTOBER 20, 1913.

a UNITED STATES OF AMERICA

United States Circuit Court of Appeals, Fifth Judicial Circuit.

Pleas and proceedings had and done at a regular term of the United States Circuit Court of Appeals for the Fifth Circuit, begun on the third Monday in November, A. D. 1911, at New Orleans, Louisiana, before the Honorable A. P. McCormick and the Honorable David D. Shelby, Circuit Judges, and the Honorable Thomas S. Maxey, District Judge:

KATE C. ARCHER, Appellant,
versus
THE GREENVILLE SAND AND GRAVEL COMPANY et al., Appellees.

Be it remembered, that heretofore, to-wit, on the 3rd day of March, A. D. 1911, a Transcript of the record of the above styled cause, pursuant to an appeal from the Circuit Court of the United States for the Southern District of Mississippi, was filed in the office of the Clerk of the said United States Circuit Court of Appeals for the Fifth Circuit, which said transcript of the record was filed and docketed in said Circuit Court of Appeals, as No. 2185, as follows:

b TRANSCRIPT OF RECORD.

United States Circuit Court of Appeals, Fifth Circuit.

No. 2185.

KATE C. ARCHER, Appellant,
versus
GREENVILLE SAND & GRAVEL CO. et al., Appellees.

Appeal from the Circuit Court of the United States for the Southern District of Mississippi.

[Original Record Filed March 3, 1911.]

U. S. Circuit Court of Appeals. Filed Mar. 31, 1911. Charles H. Lednum, Clerk.

1 UNITED STATES OF AMERICA:

In the Circuit Court of the United States for the Western Division of the Southern District of Mississippi.

KATE C. ARCHER, Appellant,
versus
GREENVILLE SAND & GRAVEL COMPANY and E. A. VOIGHT TOWING COMPANY, Defendants, Appellees.

Transcript of the Record on Appeal to the United States Circuit Court of Appeals for the Fifth Circuit.

On Appeal to the United States Circuit Court of Appeals for the Fifth Circuit.

TRANSCRIPT OF RECORD.

2 *Caption.*

Be it remembered, That at a regular term of the Circuit Court of the United States in the Fifth Circuit thereof, and in and for the Western Division of the Southern District of Mississippi, begun and holden at Vicksburg, Mississippi, on the 3rd day of January, A. D. 1911, and which said term adjourned on the 7th day of January, A. D. 1911, the Honorable Henry C. Niles, United States District Judge for the State of Mississippi, presiding, the following cause came on for trial and was tried, to-wit:

In the Circuit Court of the United States for the Western Division of the Southern District of Mississippi.

#110. Equity.

KATE C. ARCHER
vs.
GREENVILLE SAND & GRAVEL COMPANY et al.

Transcript.

Original Bill.

In Chancery Court, October Term, 1910.

K. C. ARCHER, Complainant,
vs.
E. A. VOIGHT CO. and THE GREENVILLE SAND AND GRAVEL COMPANY, Defendants.

STATE OF MISSISSIPPI.
County of Washington:

To the Honorable Chancery Court of Washington County, Mississippi:

K. C. Archer, a resident citizen of Greenville, Washington County,

Mississippi, exhibits this her bill of complaint against the
3 E. A. Voight Towing Company, a corporation incorported under the laws of the State of Kentucky, domiciled at the City of Paducah, in said state, and the Greenville Sand and Gravel Company, a corporation incorporated under the laws of the State of Kentucky, domiciled and doing business in said City of Greenville, Washington County, State of Mississippi, and would respectfully state and show unto the Court as follows, to-wit:

1.

Your complainant, K. C. Archer, formerly K. C. Deaton, owned in fee all of these certain tracts or parcels of land lying and being situate in Washington County, Mississippi, and described as follows, to-wit, all of those parts of Lot 2, Section 21, Township 18, Range 8, and Sections 9-10-11, Township 18, Range 9, lying west of the levee along the river front in said county and fronting on the said Mississippi River, save and except that lot or parcel as follows, to-wit: Two strips of 100 feet width each, as described in that instrument recorded in Deed Book X-2, at page 153 of the record of deeds of Washington County, Mississippi, which are owned by the Southern Railway in Mississippi and leased from the said Southern Railway in Mississippi by one J. M. Grasty; that said lands were entered from the United States government by various parties and then by *mense* [mesne] conveyances passed into the possession of one Benjamin Roach, whence it passed to your complainant, K. C. Archer, by *mense* [mesne] conveyances, copies of which are attached hereto and marked Exhibits Nos. 1, 2, 3 and 4

That lying in the bed of the Mississippi River in front of said lands, so owned and held by said complainant and between the bank of the said stream and the thread of the said river, there are valuable deposits of sand and gravel which your complainant alleges and charges under the laws of the State of Mississippi, are on the lands so owned and held by her, her title and right to said lands extending under the said river to the thread of the said stream.

That the defendants, The Greenville Sand and Gravel Company on the — day of ——, 1909, entered into contract with various parties, including the Yazoo & Mississippi Valley Railroad Company, to supply sand and gravel for the sum of forty-eight cents per cubic yard for the purpose of grading and raising the line of
4 said railroad, that therefor the said Greenville Sand and Gravel Company employed the E. A. Voight Company to dredge from the bed of said Mississippi River in front of the lands of said complainant; and between the river bank and the thread of the stream, the sand and gravel required by it; that the said E. A. Voight Company has gone upon the said lands and is dredging the same over the protest of your complainant; has taken, therefrom, large quantites of sand and gravel which it has delivered to the said Greenville Sand and Gravel Company at its place of business in the said City of Greenville, Mississippi, which sand and gravel, your complainant alleges, is her property and that said Greenville Sand and Gravel Company is selling the same to the pub-

lic and the Yazoo & Mississippi Valley Railroad Company and other parties.

3.

That the defendants refused either to cease dredging the sand and gravel or to make any compensation to your complainant therefor, and are constantly dredging the said sand and gravel that your complainant does not know how much of the said sand and gravel has been taken from her said land, nor to whom the same has been sold nor at what prices the same has been sold, but she alleges and charges that great quantities of the said sand and gravel have been dredged from her said land, and that a quantity was dredged and removed, the amounts of which are peculiarly within the knowledge of the defendants; that the dredging aforesaid constitutes a continuing trespass upon the lands and property of the complainant, and that she is entitled to have the same restrained by this Honorable Court and to a discovery of the amount of sand and gravel so taken and the price for each sale by the defendant- and an accounting therefor; and a decree against the defendants therefor; that she is remedyless except in a court of equity to obtain relief to which she is entitled.

Premises considered, the complainant prays the process of this Honorable Court issue to the said defendants, and that publication be made for the defendant, E. A. Voight Company, said process being returnable to the August rules of this Court; that at the said August rules this Court the said defendant- be compelled to plead answer or demur to this bill of complaint; answer under oath being hereby expressly waived, save and except to those parts hereto where discovery is prayed; that the said defendants discover to your complainant the amount of sand and gravel taken by them by
5 said dredging from in front of and on the lands of complainant, and to whom they have sold the sand and gravel, and for what prices; and that upon the hearing of this cause this Honorable Court will issue its gracious writ of injunction, restraining the said defendants, their servants, agents, representatives and employees from further trespassing upon or dredging from the said lands of the said complainant, and enforce the payments by the defendants to complainant of the money received by said defendants for the sale of said sand and gravel; and as in duty bound, *they* will ever pray, etc.

PERCY BELL,
Solicitor for Complainant.

STATE OF MISSISSIPPI,
County of Washington:

Personally appeared before me J. H. Robb, the undersigned notary public in and for the City of Greenville, Washington County, Mississippi, in my office in said city, the complainant in the foregoing bill, Mrs. K. C. Archer, who being duly sworn says that the facts stated in said bill as true are true as therein stated, and those stated on information and belief, she verily believes to be true.

MRS. KATE C. ARCHER.

Subscribed and sworn to before me, this the 21st day of July, A. D. 1910. In testimony whereof I have hereunto affixed my hand and seal on said day and date.

[L. S.]

J. H. ROBB,
Notary Public.

EXHIBIT #1.

Benjamin Roach and Wife
to
Huntington & Le Vally.

This indenture made this 4th day of January, 1869, between Benjamin Roach and Margaret E., his wife, of the first part, and Charles P. Huntington and Christopher W. Le Vally, doing business under the firm name of Huntington & Le Vally, of the second part.

Witnesseth, that the said Roach and wife, for and in consideration of the sum of $34,530.00 have this day bargained, sold,
6 aliened and conveyed and by these presents do bargain, sell, alien, convey and confirm unto the said Huntington and Le Vally all of that certain tract of land and plantation in Washington County, State of Mississippi, at the Town of Greenville, composed originally of the following lots, to-wit: The west half of the northwest quarter of Section 22, fractional Section Five, Lots 1, 2, 3, 4 and 5 of Section Twenty-One, fractional Section 20, and all of Section 6, in Township Eighteen, Range Eight, West; also fractional Section Eighteen, Lot 2 of Section Seventeen, Lots 3, 4, 5, 6, 7 and 8, and in Section 9, Lots One and Two of Section 10, all in Township Eighteen, Range Nine, West, containing 1,300 acres, more or *loss*, except such parts thereof as have been washed away by the river or have been previously sold in town lots, landings and dedicated as streets for the Town of Greenville, together with all and singular the tenements, hereditaments, privileges and appurtenances thereon belonging or in any wise appertaining. To have and to hold said land and plantation with the appurtenances unto the said Huntington & Le Vally, their heirs, assigns and to their only proper use, benefit and *behalf* forever. The said Benjamin Roach and Margaret E., his wife, do covenant, promise and agree with the said Huntington & Le Vally that they, the said Roach and wife, the aforesaid tract of land and plantation with appurtenances unto the aforesaid Huntington & Le Valiy, their heirs and assigns, sell, warrant and defend against all claims and demands whatsoever. (Trust Deed covering the lien reserved for part of purchase price recorded on succeeding pages).

In witness whereof, the said parties of the first part have hereunto set their hands and seals.

(Signed) BENJAMIN ROACH.
MARGARET E. ROACH.

STATE OF MISSISSIPPI,
Washington County:

Personally appeared before me John Fawn, clerk of the Probate Court in and for said state and county, Benjamin Roach and Margaret E. Roach, his wife, who acknowledged that they signed, sealed and delivered the foregoing deed on the day and year therein mentioned as their act and deed, and the said Margaret E. Roach having been examined by me separate and apart from her said husband acknowledged that she signed, sealed and delivered the same freely without any fear, threats or compulsion on the part of her said husband.

7 Given under my hand and official seal, this 5th day of January, 1869.

[L. S.] (Signed) JOHN FAWN,
By E. J. CANNON, *D. C.*

Recorded in Deed Book "U," pages 645 and 6.

EXHIBIT #2.

Foreclosing Roach Trust Deed.

F. Valliant, Trustee,
to
L. H. Terry, Trustee.

Deed.

In pursuance of the provisions of the deed in trust made and executed to me as trustee, by Chas. P. Huntington and Christopher W. Le Vally, and to secure the payment of certain promissory notes therein mentioned and described, which said deed in trust is recorded in Book "U," pages 66 and 67 of the records of deeds in Chancery Court clerk's office of Washington County, State of Mississippi, and at the request of E. D. Morgan & Co. and John A. Packard, the holders and owners of two lots of said notesand after having given 30 days previous notice of the time, place and terms of said sale —, did on the 1st day of January, 1878, sell to the highest bid-er for cash the following described lands, lying and being in the County of Washington, State of Mississippi, which were conveyed to me by said deed of trust, and such lands are known and described as follows, to-wit, Lots One, Two, Three, Four and Five, Section Twenty-One and all of Section Six, all in Township 18, Range 8, West, also Lots Three, Four, Five, Six, Seven and Eight of Section 9, and Lots 1 and 2 of Section 10, in Township 18, Range 9, West, but there was reserved and exempted from said sale all the said land that had caved into the river and such as had been previously sold in town lots and for a landing, and such as had been dedicated as streets for the Town of Greenville, by Benjamin Roach, Huntington & Le Vally and C. P. Huntington, and there

was also exempted from said sale the land that has been heretofore conveyed by said Huntington to the Greenville, Columbus and Birmingham Railroad (other lands sold excepted H. Terry, bid $30,496.58). In consideration of said premises and the said sum of
$30,496.58 cash in hand this day received from the said
8 L. H. Terry as agent and trustee for the said Morgan & Co. and the said John H. Packard, I have this day granted, bargained, sold and conveyed to the said L. H. Terry, all my right, title and interest in and to the foregoing described lands, with the reservations and exceptions as herein stated.

In testimony whereof, I have hereunto set my hand and seal this 1st day of January, 1878.

(Signed) F. VALLIANT.

STATE OF MISSISSIPPI,
Washington County:

Personally appeared before me the undersigned Justice of the Peace in and for the county aforesaid, the within named F. Valliant, who acknowledged that he signed, sealed and delivered the foregoing deed, as trustee, as his voluntary act and deed on the day and year therein mentioned.

Given under my hand and seal, this 2nd day of January, 1878.

(Signed) N. J. NELSON, *J. P.*

Recorded in Book "K" 2, pages [page] 696, et seq.

EXHIBIT #3.

L. H. Terry, Trustee,
to
The Greenville Land & Manufacturing Co.

Deed.

This indenture made the 29th day of October in the year 1881, between L. H. Terry, trustee, for E. D. Morgan, John T. Terry and Solon Humphries, constituting the firm of E. D. Morgan & Co., of New York, and J. A. Packard of Chicago, parties of the first part, and the Greenville Land and Manufacturing Company of Newark, N. J., parties of the second part.

Witnesseth, that the said party of the first part for and in consideration of the sum of $38,002 52/100 lawful money of the United States, and to them in hand paid by the parties of the second part, receipt whereof is hereby acknowledged, have remised, released and quit claimed and by these presents, remise, release and quit claim unto the said parties and to their assigns forever (some lands omitted) Lots One, Two, Three, four and Five, Section 21, and all of Section 6, Township 18, Range 8, West, Lots Three, Four,
Five, Six, Seven and Eight of Section 9, Lots One and Two
9 of Section Twenty-One in Township 18, Range 9, West; all of the above described lands being situate in Washington

County, State of Mississippi, and being the same lands conveyed by F. Valliant, trustee, to the said L. H. Terry, trustee, by deed dated January 1st, 1878, and recorded at page 696 of Book "K" 2, of the deed records of Washington County in Mississippi. (Except so much of said land as has caved into the Mississippi River, and except Lots 4 and 6 of Block 2 of the Huntington addition to the Town of Greenville, which said two lots having been sold by L. H. Terry, trustee, and it is further understood and agreed that this conveyance of the above described lands is made subject to the same provisions and exceptions as are conditioned in said deed of F. Valliant, trustee, to said L. H. Terry, trustee, as if the same were incorporated in this deed and special reference is hereby made to said deed of F. Valliant, trustee, to said L. H. Terry, trustee, to ascertain said reservations and exceptions, together with all and singular tenements, hereditaments and appurtenances thereto belonging or in anywise appertaining and the reversion or reversions, remainder or remainders, rents, issues and profits thereof and also all of the estate, right, title and interest as well in law as in equity of the said party of the first part of, in or to the above described premises and every part and parcel thereto with the appurtenances; to have and to hold all and singular the above mentioned and described premises, together with the appurtenances unto the said party of the second part, their heirs and assigns forever.

In witness whereof the said party of the first part has hereunto set his hand and seal on the day and year first above written.

(Signed) L. H. TERRY, *Trustee.*

STATE OF LOUISIANA.
City of New Orleans:

Be it known that on this 7th day of December, 1881, before me, Marcel T. Ducros, a commissioner of deeds for the State of Louisiana, duly commissioned and authorized by the governor of the State of Mississippi, to take acknowledgments and proof of deeds and other instruments of writing to be used or recorded in said State of Mississippi; personally came and appeared L. H. Terry whose genuine signature is affixed to the foregoing document which he has signed as L. H. Terry, trustee, who has declared and acknowledged that he signed, sealed, executed and delivered the foregoing document of his own free will on the date the same bears date and for the object and purposes therein mentioned.

In testimony whereof, I hereunto set my hand and seal of office in the City of New Orleans, on this 7th day of December, 1881.

(Signed) MARCEL T. DUCROS,
Commissioner of Deeds for the State of Mississippi.

Recorded in Book "N"-2, pages [page] 338, et seq.

EXHIBIT #4.

Greenville Land and Manufacturing Company
to
K. C. Deaton.

Deed.

In consideration of $10.00 cash paid to it by K. C. Deaton and that K. C. Deaton has this day executed to it her promissory note for $3,953.78, payable on the 15th day of December, 1895, and bearing interest at the rate of 8% per annum, from date until paid, The Greenville Land and Manufacturing Company, a corporation organized under the laws of the State of Mississippi, by its duly authorized officers, does convey and warrant to the said K. C. Deaton that land in the County of Washington, State of Mississippi, described as (large amount of said property omitted) that portion of fractional Sections 17 and 18, and all of Section 9, and all of Section- 10 and 11, not included in the homestead exemption of Anna D. Daley, lying west of the public levee as now located and not hitherto sold by said company or by the parties from whom it derived title, all in Township 18, Range 9, west, also; also all of Sections 6 and 21, Township 18, Range 8, West, lying west of the public levee as at present located and not hitherto sold by said company or by the parties from whom it derived title. (Other property omitted; lien retained for note).

Witness the signature of said company by its president and secretary and corporate seal affixed by said officers, this 1st day of February, 1895.

(Signed) GREENVILLE LAND & MANUFACTURING CO.
C. H. STARLING, *President.*
G. F. ARCHER, *Secretary.*

11 STATE OF MISSISSIPPI,
County of Washington, City of Greenville:

Personally appeared before me, J. H. Robb, a notary public in and for the City of Greenville, County of Washington, the within named C. H. Starling and George F. Archer, who acknowledged that as president and secretary of the Greenville Land & Manufacturing Company, they signed the name of said company to the foregoing instrument and affixed thereto, its corporate seal and delivered the said instrument on the day and year therein mentioned.

Given under my hand and seal of office at Greenville, Mississippi, this 11th day of February, 1895.

(Signed) J. H. ROBB,
Notary Public.

Recorded in Deed Book "L"-3, pages 748 to 51, lien canceled January 24th, 1896.

Filed July 21st, 1910.

W. W. MILLER, *Clerk.*

Petition for Removal.

In the Chancery Court of Washington County, Mississippi.

No. 4250.

Mrs. K. C. Archer, Complainant,
vs.
The Greenville Gravel Co., a Corporation, et al., Defendants.

To the Chancery Court of Washington County, Mississippi:

Your petitioners, The Greenville Gravel Company and the E. A. Voight Towing Company, respectfully show that they are the only defendants in the above styled cause, and that the matter and amount in dispute in the above entitled suit exceeds the sum or value of two thousand dollars, exclusive of interest and costs, though no specific sum is sued for in bill of complaint herein, still the value of the property in dispute, to-wit, the gravel alleged to have been taken by the defendants from the land of plaintiff, exceeds the sum of two thousand dollars, exclusive of interest and costs. That the controversy in said suit is and at the time of the commencement of the suit was between citizens of different states, that your petitioners the defendants in the above entitled suits were each at the time of the commencement of the suit and still are corporations char-
12 tered, organized existing under and by virtue of the laws of the State of Kentucky, with the principal office of each in the City of Paducah, McCracken County, Kentucky, and not chartered or organized under the laws of the State of Mississippi, and that the plaintiff, Mrs. K. C. Archer, was then and still is a resident and citizen of Washington County, State of Mississippi.

And your petitioners offer herewith good and sufficient bonds for their entering in the Circuit Court of the United States for the Western Division of the Southern District of Mississippi on the first day of its next session a copy of the record in this suit and for paying all costs that may be awarded by the said Circuit Court of the United States, if the said Court shall hold that this suit was wrongfully and improperly removed thereto.

And your petitioners therefore pray that the said bonds and the sureties thereon may be accepted; that this suit may be removed in to the next Circuit Court of the United States to be held in the Western Division of the Southern District of Mississippi, pursuant to the statutes of the United States. That this Honorable Court proceed no further herein except to make the order of removal required by law and to accept the said bonds and sureties and to cause the record herein to be removed into said Circuit Court.

And petitioners will ever pray, etc.

GREENVILLE GRAVEL COMPANY,
[SEAL.] By F. W. KATTERJOHN, *Pt.*
E. A. VOIGHT TOWING COMPANY, Pt.,
[SEAL.] By F. W. KATTERJOHN, *Pt.*
WALTON SHIELDS, *Solicitor.*

STATE OF KENTUCKY,
County of ——:

Personally appeared before me, Peter Puryear, a notary public in and for said county and state. F. W. Katterjohn, who having been by me first duly sworn, depose- and say- that he is the president of Greenville Gravel Company, and of the E. A. Voight Towing Company, respectively of the Greenville Gravel Company, a corporation, and the E. A. Voight Towing Company, a corporation, the above named petitioners, that the foregoing petition is true to his own knowledge except to the matters therein stated to be alleged upon information and belief and as to those matters he *each* believe- them to be true.

F. W. KATTERJOHN.

13 Subscribed and sworn to before me, this 5th day of August, A. D. 1910.

PETER PURYEAR,
Notary Public.

My Commission expires January 10th, 1912.

Filed August 6th, 1910.

W. W. MILLER, *Clerk*,
By J. A. SHALL, *D. C.*

Order of Removal.

Minutes Chancery Court, Washington County, August 17th, 1910.

In the Chancery Court of Washington County, Mississippi.

No. 4250.

KATE C. ARCHER, Complainant,
vs.
GREENVILLE GRAVEL CO. and E. A. VOIGHT TOWING CO., Corporations, Defendants.

The defendants herein having each within the time provided by law filed its petition for the removal of this cause to the Circuit Court of the United States for the Southern District, Western Division thereof of the State of Mississippi, and each having at the same time offered its bond in the sum of five hundred dollars with the United States Fidelity and Guaranty Company of Baltimore, Md., good and sufficient surety pursuant to statute and conditioned according to law.

Now, therefore, this Court acting in vacation by consent of the parties hereto by their solicitors of record, does hereby accept and approve said bonds and accept said petitions, and does order, adjudge and decree that this cause be removed for trial to the next term of the Circuit Court of the United States for the Western Division of the Southern District of Mississippi, pursuant to the statutes

of the United States and that all other proceedings of this Court be stayed.

Ordered, adjudged and decreed this August 17th, 1910.

E. N. THOMAS, *Chancellor.*

Filed August 17th, 1910.

W. W. MILLER, *Clerk,*
By J. A. SHALL, *D. C.*

Minute Book 10, page 80.

14 In the Chancery Court of Washington County, Mississippi.

No. 4250.

Mrs. KATE C. ARCHER
vs.
GREENVILLE GRAVEL COMPANY et al.

Know all men by these presents that the E. A. Voight Towing Company, a corporation organized under the laws of the State of Kentucky, as principal, and The United States Fidelity & Guaranty Co. of Baltimore, Md., as surety, are holden and stand firmly bound unto Mrs. Kate C. Archer, complainant in the above entitled cause pending in the Chancery Court of Washington County, Mississippi, in the penal sum of five hundred ($500.00) dollars for the payment whereof well and truely to be made unto the said Mrs. Kate C. Archer, complainant as aforesaid, we bind ourselves, our heirs, representatives and assigns.

Upon condition, nevertheless, that whereas the said E. A. Voight Towing Company and The Greenville Gravel Co., the other defendant in said cause have each petitioned the Honorable Chancery Court of Washington County, Mississippi, for the removal of a certain cause therein pending, wherein the said Mrs. Kate C. Archer is complainant and the said E. A. Voight Towing Company and The Greenville Gravel Co. are defendants to the Circuit Court of the United States for the Western Division of the Southern District of Mississippi.

Now, if the said E. A. Voight Towing Co. shall enter into said Circuit Court of the United States on the first day of its next session a copy of the record in said suit and shall well and truly pay all costs that may be awarded by said Circuit Court of the United States if said Court shall hold that said suit was wrongfully or improperly removed thereto, then this obligation shall be void, otherwise it shall remain in full force and virtue.

Witness the hand and seal of said E. A. Voight Towing Co. and said United States Fidelity & Guaranty Co., this 6th day of August, 1910.

E. A. VOIGHT TOWING CO.
F. W. KATTERJOHN, *Pres.*,
By F. W. KATTERJOHN, *Pres.*
THE UNITED STATES FIDELITY & GUARANTY CO.,
By LYNNE STARLING, JR., *Gen'l Agent.*
By WALTON SHIELDS, *Att'y in Fact.*

Approved this Aug. 6/10.

W. W. MILLER, *Clerk.*

15 In the Chancery Court of Washington County, Mississippi.

No. 4250.

Mrs. Kate C. Archer
vs.
Greenville Gravel Company et al.

Know all men by these presents that the Greenville Gravel Company, a corporation organized under the laws of the State of Kentucky, as principal, and The United States Fidelity & Guaranty Co. of Baltimore, Md., as surety, are holden and stand firmly bound unto Mrs. Kate C. Archer, complainant in the above entitled cause pending in the Chancery Court of Washington County, Mississippi, in the penal sum of five hundred ($500.00) dollars for the payment whereof well and truly to be made unto the said Mrs. Kate C. Archer, complainant, as aforesaid, we bind ourselves, our heirs, representatives and assigns.

Upon condition, nevertheless, that whereas the said Greenville Gravel Company and The E. A. Voight Towing Co., the other defendant in said cause, have each petitioned the Honorable Chancery Court of Washington County, Mississippi, for the removal of a certain cause therein pending, wherein the said Mrs. Kate C. Archer is complainant and the said Gravel Company and The E. A. Voight Towing Co. are defendants to the Circuit Court of the United States for the Western Division of the Southern District of Mississippi.

Now, if the said Greenville Gravel Co. shall enter into said Circuit Court of the United States on the first day of its next session a copy of the record in said suit and shall well and truly pay all costs that may be awarded by said Circuit Court of the United States if said Court shall hold that said suit was wrongfully or improperly removed thereto, then this obligation shall be void otherwise it shall remain in full force and virtue.

Witness the hand and seal of said Greenville Gravel Co. and said The United States Fidelity & Guaranty Co., this 6th day of August, 1910.

GREENVILLE GRAVEL CO.
F. W. KATTERJOHN, *Pres.*
By F. W. KATTERJOHN, *Pres.*
THE UNITED STATES FIDELITY & GUARANTY CO.,
By LYNNS STARLING, *Gen. Agt.*
By WALTON SHIELDS, *Att'y in Fact.*

Approved this Aug. 6 '10.

W. W. MILLER, *Clerk.*

16 State of Mississippi.
County of Washington:

I, W. W. Miller, clerk of the Chancery Court in and for said county and state, do hereby certify that the foregoing 16 pages

contain a true and correct copy of the record and proceedings had in the case of K. C. Archer vs. Greenville Sand abd [and] Gravel Company, and E. A. Voight Towing Company, corporations, as fully and completely as the same appears on file and on record in my office, also the original removal bonds.

Given under my hand and official seal this the 17th day of September, A. D. 1910.

W. W. MILLER,
Clerk of the Chancery Court.

The foregoing papers are indorsed on the back as follows, to-wit: "No. 110. Eq. In the Circuit Court of the United States, Western Division of the Southern District of Mississippi. Mrs. Kate C. Archer vs. Greenville Gravel Co. Transcript. Filed and entered Sept. 21, 1910. L. B. Moseley, Clerk; J. H. Short, D. C."

Demurrer of Defendants.

UNITED STATES OF AMERICA:

In the Circuit Court for Western Division, Southern District of Mississippi.

In Equity. No. —.

KATE C. ARCHER
vs.
GREENVILLE GRAVEL COMPANY et al.

To the Honorable H. C. Niles, Judge of said Court, in Equity:

Now come the defendants in the above styled cause, to-wit, The Greenville Gravel Company, a corporation, and The E. A. Voight Towing Company, a corporation, and demur to the bill of complaint herein and assign the following grounds of demurrer:

1st. There is no equity in the bill.

17 2nd. The complainant has no right to a discovery because there is no ground for equitable relief.

3rd. The continuing trespass complained of is not of the character that entitles complainant to equitable relief.

4th. Complainant has no right to an accounting in equity.

5th. The complainant has a complete and adequate remedy at law.

6th. The complainant has no title to the lands extending under the Mississippi River to the thread of the stream beyond low water mark, nor to the sand and gravel thereon.

7th. Even, if riparian owners on the Mississippi River own the *the* bed of the stream to the middle thereof, complainant's bill shows that she is not a riparian owner, and that the land conveyed to her is limited in the grant to the river bank and that she has no title to the land beyond nor to the sand and gravel on the river bed.

8th. It is not alleged in said bill that said sand and gravel was taken from that part of the bed of the river which was east of the thread of the stream or middle of the river at the time complainant acquired title to the lands described in the bill.

Nor is it alleged in said bill that the thread or middle of the stream is at present time where it was when complainant acquired title to the lands described in the bill, nor is it shown that there has been no change since said time in the thread of said stream affecting the land from which said gravel is alleged to have been taken.

9th. And for other causes to be assigned at hearing.

WALTON SHIELDS,
Solicitor for Defendants.

I hereby certify that in my opinion the foregoing demurrer ought to be sustained and that I have this day delivered a copy hereof to Percy Bell, solicitor for complainant.

WALTON SHIELDS, *Solicitor.*

18 The above and foregoing instrument is indorsed on the back as follows, to-wit:

"110. Eq. In U. S. Court, Western Division, Southern District of Mississippi. Mrs. Kate C. Archer vs. Greenville Gravel Co., et al. Demurrer of Defendants. Walton Shields, Solicitor for Defendant. Filed and Entered Sept. 21, 1910. L. B. Moseley, Clerk; J. H. Short, D. C.

Decree Dismissing Bill of Complaint.

In the Circuit Court of the United States, Western Division, Southern District of the State of Mississippi, January Term, 1911.

No. 110. In Equity.

Mrs. Kate C. Archer
vs.
Greenville Gravel Co. et al.

This cause coming on this day to be heard on the demurrer of all the defendants herein to the bill of complaint herein, and the Court being sufficiently advised doth order, adjudge and decree that the demurrer be and the same is sustained, and complainant granted ninety days within which to file an amended bill; thereupon, the complainant declined to amend her bill and it is therefore ordered, adjudged and decreed that the bill of complaint be and the same is dismissed, and that she pay all costs to which action of the Court the complainant excepted and praying an appeal in open Court, the same is granted and allowed and complainant is granted and allowed ninety days within which to file her appeal bond herein, conditioned according to law in the sum of $500.00 and to perfect her appeal.

Ordered, adjudged and decreed this the 6th day of January, 1911.

H. C. NILES, *Judge.*

The foregoing instrument is indorsed on the back as follows, to-wit:

"No. 110. Kate C. Archer vs. Greenville Gravel Co., et al. Final Decree. Filed and entered January 6th, 1910. L. B. Moseley, Clerk; J. H. Short, D. C. M. B. 3, p. 487."

19 *Assignment of Errors.*

In the Circuit Court of the United States for the Western Division of the Southern District of Mississippi.

No. 110. In Equity.

KATE C. ARCHER
vs.
GREENVILLE SAND & GRAVEL COMPANY et al.

On this the 6th day of January, 1911, comes the complainant by her solicitor, Percy Bell, and says that the final decree of the Court herein dismissing her bill of complaint is erroneous and assigns as grounds of error, the following:

1. The Court erred in sustaining the demurrer filed herein by defendants to the bill of complaint.

2. The Court erred in dismissing the bill of complaint filed herein by the complainant.

KATE C. ARCHER,
By PERCY BELL, *Solicitor.*

The foregoing instrument is indorsed on the back as follows, to-wit: "No. 110. K. C. Archer vs. Greenville Sand & Gravel Co., et al. Assignment of Error. Filed & entered Jan. 6, 1911. L. B. Moseley, Clerk; J. H. Short, D. C.

Appeal Bond.

In the Circuit Court of the United States for the Western Division of the Southern District of Mississippi.

No. 110. In Equity.

KATE C. ARCHER
vs.
GREENVILLE SAND & GRAVEL COMPANY et al.

Know all men by these presents, that Kate C. Archer, as principal, and George F. Archer, Percy Bell and C. G. Bell, as sureties, are held and firmly bound unto the Greenville Sand & Gravel company and the E. A. Voight Company, in the sum of five hundred dollars ($500.00) well and truly to be paid said Greenville Sand &
20 Gravel Company and E. A. Voight Company, their attorneys, executors, administrators or assigns, which payment well and

truly to be made the said Kate C. Archer, and George F. Archer, Percy Bell and C. G. Bell hereby bind themselves their heirs, executors and assigns firmly by these presents.

The condition of the foregoing bond is such that whereas on the 6th day of January, 1911, a final decree of the Circuit Court of the United States for the Western Division of the Southern District of Mississippi; the Honorable H. C. Niles sitting in equity, was rendered sustaining a demurrer filed in the above styled cause by the defendants and dismissing the original bill filed in said cause at the cost of complainant Kate C. Archer; and,

Whereas, the said Kate C. Archer feels aggrieved by said decree and has prayed and been granted an appeal to the Circuit Court of Appeals to reverse said decree and citation has been directed issued to the said Greenville Sand & Gravel Company and E. A. Voight to answer said appeal on the first day of March, 1911; now,

Therefore, if the said Kate C. Archer shall well and truly prosecute said appeal and shall abide the judgment of said Circuit Court of Appeals and pay all costs of this appeal and which may be adjudged against her therein, then this obligation shall be null and void, otherwise it shall remain in full force and virtue.

Witness our signatures this 6th day of January, 1911.

KATE C. ARCHER,
By PERCY BELL, *Att'y.*
GEORGE F. ARCHER,
By PERCY BELL, *Att'y.*
PERCY BELL.
C. G. BELL.

The foregoing bond is approved this January 6th, 1910.

H. C. NILES, *Judge.*

The foregoing instrument is indorsed on back as follows, to-wit: "No. 110. Kate C. Archer vs. Greenville Sand & Gravel Co., et al. Appeal Bond. Filed and entered Jan. 6, 1911. L. B. Moseley, Clerk; J. H. Short, D. C."

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Law Office of Percy Bell,
Ex-Chancellor Seventh District,
Greenville, Miss.

JANUARY 14TH, 1911.

Mr. J. H. Short, Deputy Clerk, Vicksburg, Miss.

DEAR SIR: On bejalf [behalf] of the defendants in the case of E. C. Archer vs. Greenville Sand and Gravel Co., all of whom I represent, I hereby waive service of citation on said defendants in the appeal taken in said cause by the complainant to the Circuit Court of Appeals, and enter their appearance in said appeal.

Very truly,

WALTON SHIELDS,
Solicitor for Defendants.

The above and foregoing instrument is indorsed on back as follows, to-wit:

"No. 110. Eq. In the Circuit Court of the United States, Western Division of the Southern District of Mississippi. Mrs. Kate C. Archer vs. Greenville Sand & Gravel Co., et al. Waiver of Citation. Filed and entered Jan. 16, 1911. L. B. Mosely, Clerk; J. H. Short, D. C.

22 *Certificate.*

Clerk's Certificate.

I, L. B. Moseley, clerk of the Circuit Court of the United States, in the Fifth Circuit, and the Western Division of the Southern District of Mississippi, do hereby certify that the above and foregoing is a full, true and correct transcript of the record, assignments of error and all proceedings had and done in cause No. 110 in Equity, wherein Kate C. Archer is complainant and Greenville Sand & Gravel Company and E. A. Voight Towing Company are defendants, as fully as the same remains on file and of record in my office in the City of Vicksburg, Mississippi.

Witness my signature and the seal of said Court at Vicksburg, Mississippi, this the 23rd day of February, A. D. 1911.

L. B. MOSELEY, *Clerk,*

[SEAL.] By J. H. SHORT,

Deputy Clerk.

23 That thereafter, the following proceedings were had in said cause in the United States Circuit Court of Appeals for the Fifth Circuit, viz:

Argument and Submission.

Extract from the Minutes of February 6th, 1912.

No. 2185.

KATE C. ARCHER

vs.

GREENVILLE SAND & GRAVEL CO. et al.

On this day this cause was regularly called, and after argument by Percy Bell, Esq., for appellant, and Gustave Lemle Esq., for Appellee-, was submitted to the Court.

Opinion of the Court.

Filed April 9th, 1912.

United States Circuit Court of Appeals, Fifth Circuit.

No. 2185.

KATE C. ARCHER, Appellant,
vs.
GREENVILLE SAND & GRAVEL COMPANY et al., Appellees.

Appeal from the Circuit Court of the United States for the
24 Southern District of Mississippi.

For the Appellant: Percy Bell.
For the Appellees: Walton Shields.

Before McCormick and Shelby, Circuit Judges, and Maxey, District Judge.

By the COURT: After mature consideration of the questions arising on the present appeal, we are of the opinion that the demurrer, interposed by the appellees to the bill of complaint, was properly sustained. The decree of the trial Court dismissing the bill is therefore affirmed.

Judgment.

Extract from the Minutes of April 9, 1912.

No. 2185.

KATE C. ARCHER
vs.
GREENVILLE SAND & GRAVEL COMPANY et al.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the Southern District of Mississippi, and was argued by counsel.

25 On consideration whereof, it is now here ordered, adjudged and decreed by this Court that the decree of the said Circuit Court in this cause be, and the same is hereby, affirmed.

It is further ordered, adjudged and decreed that the appellant, Kate C. Archer, and the sureties on the appeal bond herein, George F. Archer, Percy Bell and C. G. Bell, be condemned to pay the costs of this cause in this Court, for which execution may be issued out of the District Court of the United States for the Southern District of Mississippi.

26 *Petition for Rehearing.*

Filed April 26th, 1912.

United States Circuit Court of Appeals, Fifth Circuit.

No. 2185.

KATE C. ARCHER, Appellant,
versus.
THE GREENVILLE SAND AND GRAVEL COMPANY et al., Appellees.

Petition for Rehearing.

After a careful examination of the opinion of the Honorable Court, rendered in the above cause on April 9th, 1912, counsel for appellant believes that with propriety he may ask the Court to consider whether or not this case be one in which it will be proper to grant a rehearing on the following grounds:

1.

The opinion of this Court gives no decision on the points at issue in this case. A reading of the demurrer will show that the first five grounds thereof are as to the jurisdiction of a court of equity.
27 The sixth ground presents the crux of the case, which is, the right of the appellant to claim title to those lands lying in the bed of the Mississippi River adjacent to her riparian lands and between her said lands and the thread of the stream. The seventh ground raises the question of the construction of the deed under which she claims, while the eighth and ninth grounds raise the question of the sufficiency of the allegations of the bill, both of which grounds may be cured by amending.

It will be observed that if the demurrer was sustained on the first five grounds, appellant has only to seek another forum; that if sustained on the sixth ground the basis of her case is swept from under her and very far-reaching conclusions of law are established by this Court; if the demurrer was sustained on the seventh and eighth grounds, and not on the others, appellant should be granted leave to amend the bill.

The learned judge below sustained the demurrer solely on the grounds of the jurisdiction of the Court, and counsel believing him to be mistaken, appealed to settle that point, of course, arguing the other points of the demurrer on appeal. It is respectfully submitted that the rights of of the appellant being questioned in three ways, any one of which would have a totally different effect upon her rights of future procedure, that the Court may, with propriety, be asked to grant her a rehearing, or at any rate, indicate its conclusions in its opinion.

2.

The intention of the request for a re-argument herein is clearly to direct the attention of the Court to the fact that this case, involving as it does, important principles of law and extensive property rights, is left in an inchoate state under present conditions. If this Court was of the same opinion that the Judge below entertained, then the demurrer was sustained purely on the ground that the appellant was in the improper forum and she could go into a court of law and recover for the damage done her. With the opinion of the Court sustaining the demurrer without indicating the state of mind of the Court on the exact grounds of sustaining the demurrer it is more than probable that in an action at law she would be met with a plea of res adjudicata.

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3.

Not only in order to establish the rights of this litigant, but for the purpose of fixing definitely, the rights of all Mississippi riparian owners bordering the western boundary and the proper forum for their assertions, we submit that this case is one in which the Court can well afford to hear a re-argument and subsequently clearly define the principles to establish those rights. The case is one, we submit, of some importancee, involving as we have said, the rights of riparian owners along the whole western boundary of Mississippi, and in this particular case, involving many thousands of dollars. If appellant is in the wrong forum she would wish to seek the right one for redress. Counsel submits, with all possible respect for the Court, that the opinion as rendered by it does not indicate whether or not the Court has considered or passed on the several points involved in the case, or what its conclusion is as to the legal rights of appellant and the forum for their assertion. Because of the importance of this case and the high respect that counsel entertains for the Court, he respectfully requests a rehearing.

4.

In the argument of the case before the Court, counsel would wish to again call the attention of the Court to the question raised by this case as to the rights of Mississippi riparian owners, which, for the protection of appellant and other riparian owners should be definitely ascertained.

Wherefore upon the foregoing grounds the appellant respectfully prays that this Honorable Court grant her a rehearing of said cause.

PERCY BELL
Solicitor for Appellant.

I, Percy Bell, counsel for the appellant herein, do hereby certify that in my judgment the foregoing petition for a rehearing is well founded and that the same is not interposed for delay.

PERCY BELL.

29 *Order Denying Rehearing.*

Extract from the Minutes of May 10th, 1912.

KATE C. ARCHER
vs.
THE GREENVILLE SAND & GRAVEL COMPANY et al.

Ordered that the petition for rehearing filed in this cause be, and the same is hereby denied.

Clerk's Certificate.

United States Circuit Court of Appeals, Fifth Circuit.

I, Frank H. Mortimer, Clerk of the United States Circuit Court of Appeals for the Fifth Circuit, do hereby certify that the pages numbered from 23 to 29 next preceding this certificate contain full, true and complete copies of all the pleadings, record entries and proceedings, including the opinion of the United States Circuit
30 Court of Appeals for the Fifth Circuit, in a certain cause in said Court numbered 2185, wherein Kate C. Archer is Appellant, and the Greenville Sand & Gravel Company et al. are Appellees, as full, true and complete as the originals of the same now remain in my office.

I further certify that the pages of the printed record numbered from 1 to 22 are identical with the printed record upon which said cause was heard and decided in said Circuit Court of Appeals.

In testimony whereof, I hereunto subscribe my name, and affix the seal of the said Circuit Court of Appeals, at my office in the City of New Orleans, Louisiana, in the Fifth Circuit, this 30th day of May, A. D. 1912.

[Seal United States Circuit Court of Appeals, Fifth Circuit.]

FRANK H. MORTIMER,
Clerk of the United States Circuit Court of Appeals, Fifth Circuit.

31 UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the United States Circuit Court of Appeals for the Fifth Circuit, Greeting:

Being informed that there is now pending before you a suit in which Kate C. Archer is appellant, and Greenville Sand & Gravel Company et al. are appellees, which suit was removed into the said Circuit Court of Appeals by virtue of an appeal from the Circuit Court of the United States for the Southern District of Mississippi,

and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Circuit Court of Appeals and removed into the Supreme Court of the
32 United States, do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the 18th day of June, in the year of our Lord one thousand nine hundred and twelve.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

33 [Endorsed:] File No. 23,246. Supreme Court of the United States. No. 1170, October Term, 1911. Kate C. Archer, Petitioner, vs. The Greenville Sand & Gravel Company et al. Writ of Certiorari. No. 2185. U. S. Circuit Court of Appeals. Filed Jul- 1, 1912. Frank H. Mortimer, clerk.

34 United States Circuit Court of Appeals for the Fifth Circuit.

No. 2185.

KATE C. ARCHER, Appellant,
vs.
GREENVILLE SAND & GRAVEL CO. et al., Appellees.

I, Frank H. Mortimer, Clerk of the United States Circuit Court of Appeals for the Fifth Circuit, do hereby certify that the transcript of the record of the proceedings of this Court in the above entitled cause, heretofore certified by me for filing in the Supreme Court of the United States, was correct and complete as the same then appeared in this Court.

In pursuance of the command of the foregoing Writ of Certiorari, I now hereby certify that on the 5th day of July, 1912, there was filed in my office a stipulation in the above entitled cause, in the following words, to-wit:

No. 2185.

In the United States Circuit Court of Appeals for the Fifth Circuit.

KATE C. ARCHER, Appellant,
vs.
GREENVILLE SAND & GRAVEL CO. et al., Appellees.

Stipulation of Counsel.

It is hereby stipulated that the transcript already filed in the Clerk's office of the Supreme Court of the United States, with the

petition for the writ of certiorari, be taken as a return to said writ.

New Orleans, La., this 3d day of July, 1912.

(Signed) T. M. MILLER,
Counsel for Appellant.

35 (Signed) GUSTAVE LEMLE,
Counsel for Appellees.

I further certify that the above is a true and correct copy of said stipulation, and of the whole thereof.

Witness my official seal, signature, and the seal of said Circuit Court of Appeals, at the City of New Orleans, in said Circuit, this the 5th day of July, 1912.

[Seal United States Circuit Court of Appeals, Fifth Circuit.]

FRANK H. MORTIMER,
Clerk of the United States Circuit Court of Appeals, Fifth Circuit.

36 [Endorsed:] 671-12 23246. No. 2185. United States Circuit Court of Appeals for the Fifth Circuit. Kate C. Archer, Appellant, vs. Greenville Sand & Gravel Co., Appellee. Return to Writ of Certiorari.

37 [Endorsed:] File No. 23,246. Supreme Court U. S., October Term, 1912. Term No. 671. Kate C. Archer, Appellant, vs. The Greenville Sand & Gravel Co. et al. Writ of certiorari and return. Filed July 15, 1912.

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No. ~~1170~~

IN THE

Supreme Court of the United States

No. ——

KATE C. ARCHER, APPELLANT,

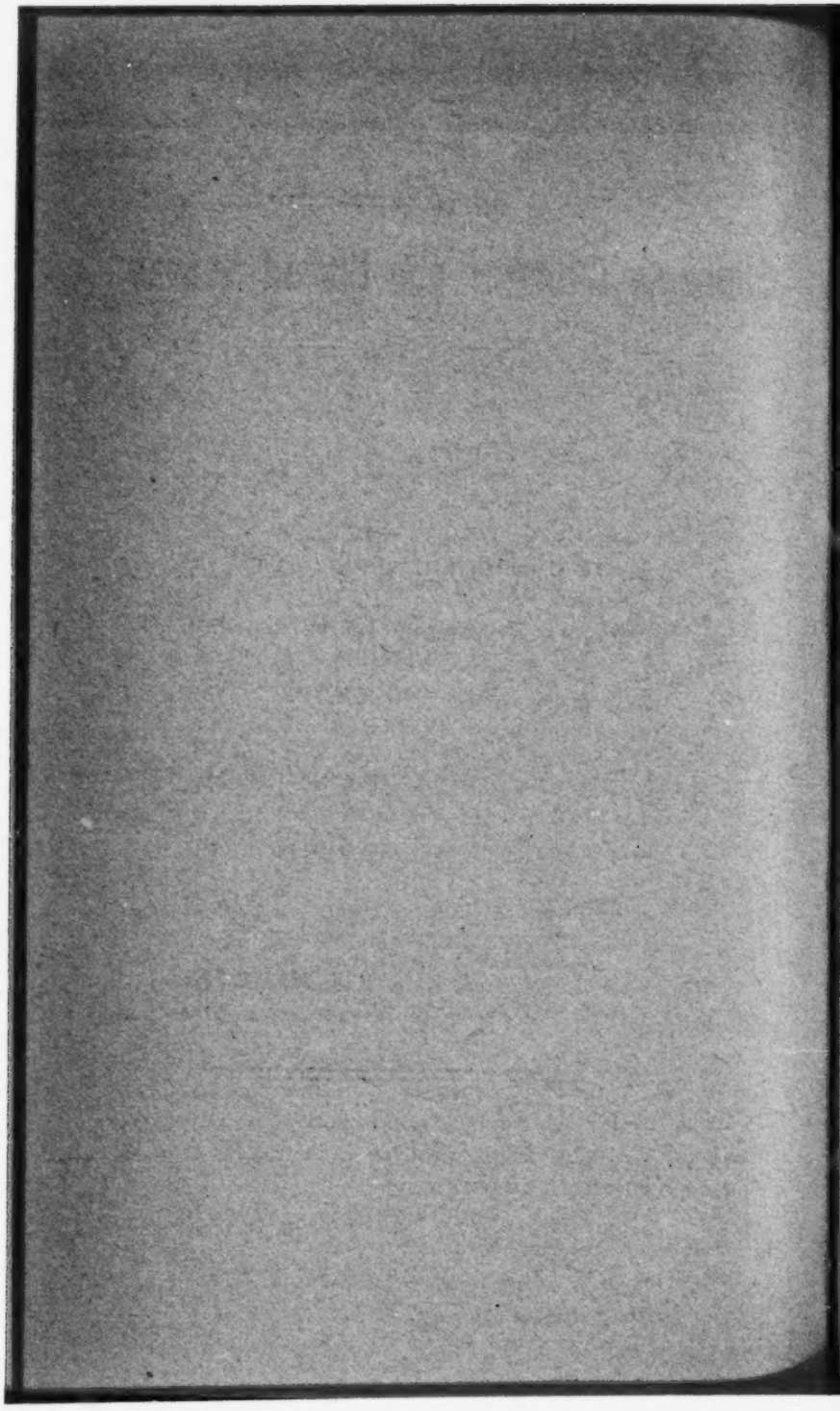
versus

THE GREENVILLE SAND AND GRAVEL COMPANY *ET AL.*, APPELLEES.

PETITION FOR A WRIT OF CERTIORARI.

T. M. MILLER,
Attorney and Counsel for Petitioner.

J. G. Hauser, "The Legal Printer," 620-22 Poydras St., N. O., La.



IN THE

Supreme Court of the United States

No. ——

KATE C. ARCHER, APPELLANT,

versus

THE GREENVILLE SAND AND GRAVEL COMPANY *ET AL.*, APPELLEES.

PETITION FOR A WRIT OF CERTIORARI.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

The petition of Mistress Kate C. Archer, a resident of the State of Mississippi, respectfully represents:

FIRST. That on the 21st day of July, 1910, your petitioner exhibited her bill of complaint in the Chancery Court of Washington County, Mississippi, against the Greenville Sand and Gravel Company and the E. A. Voight Towing Company, alleging in substance:

(*a*) That she was the owner of certain lands described in the bill fronting on the Mississippi River in said county.

(*b*) That she darraigned her title by mesne conveyances from a patentee of the United States.

(*c*) That, by virtue of her riparian ownership, her right and title extended, under the laws of the State of Mississippi, to the thread of the channel.

(*d*) That between the thread of the channel and the shore there was a valuable deposit or formation of sand and gravel, her property.

(*e*) That the Sand and Gravel Company entered into a contract with a certain railroad company to supply it with sand and gravel to raise its roadbed at the price of forty-eight cents per cubic yard, and employed its codefendant to dredge from the bed of the Mississippi River in front of complainant's land, and between the river bank and the thread of the stream, the sand and gravel required.

(*f*) That the Voight Company had gone upon the premises and had taken a large quantity of the material therefrom, and was then still so engaged, and that it had delivered a large quantity to the Sand and Gravel Company, which the latter had disposed of to the railroad company and to the public, but the quantity taken and prices received complainant had no means of knowing, and that the same were peculiarly within the knowledge of the defendants, or the defendant, the Sand and Gravel Company.

(*g*) That the defendants refused either to cease dredging the sand and gravel or to make any compensation to your complainant therefor, and that the trespass was a

continuing one, and that complainant had no means of knowing to whom that taken out had been sold.

(*h*) That she was without remedy save in equity.

Wherefore, she prayed for a discovery and accounting for the sand and gravel so taken from her lands, and for an injunction against the continuance of the trespass.

The defendants removed the cause into the (then) Circuit Court of the United States for the Southern District of Mississippi, Western Division, and there interposed a demurrer to the bill upon the following grounds:

1. That there was no equity in the bill.

2. That complainant had no right to a discovery because she had no right to equitable relief.

3. That the continuing trespass complained of was not of such character as entitled complainant to equitable relief.

4. That complainant had no right to an accounting in equity.

5. That complainant had a complete and adequate remedy at law.

6. That complainant had no right to the lands extending under the Mississippi River to the thread of the stream beyond the low-water mark, nor to the sand and gravel thereon.

7. That, even if riparian owners on the Mississippi River own the bed of the stream to the middle thereof, complainant's bill showed that she was not a riparian owner, and that the land conveyed to her was limited in the grant to the river bank, and that she had no title to

the land beyond nor to the sand and gravel on the river bed.

8. That it was not alleged in said bill that said sand and gravel were taken from that part of the bed of the river which was east of the thread of the stream, or middle of the river, at the time complainant acquired title to the lands described in the bill.

Nor is it alleged that the thread or middle of the stream was at the then present time where it was when complainant acquired title to the lands described in the bill, nor was it shown that there had been no change since said time in the thread of the said stream, affecting the land from which said gravel is alleged to have been taken.

9. And generally for other cause to be assigned at the hearing.

NOTE.—Complainant's bill set out her chain of title as exhibits, and one or more of them contained an exception of "such land as had caved into the Mississippi River."

SECOND. Petitioner further shows that the Circuit Court sustained the said demurrer without stating upon what ground, granting complainant leave to amend, however, and, upon her declining, entered a final decree dismissing the bill.

THIRD. That your petitioner prosecuted an appeal from said decree to the United States Circuit Court of Appeals for the Fifth Circuit, and made the following assignment of errors:

1. The Court erred in sustaining the demurrer filed herein by defendants to the bill of complaint.

2. The Court erred in dismissing the bill of complaint filed herein by the complainant.

Petitioner further shows that said cause was argued orally and on briefs in said Circuit Court of Appeals, and that on the 9th day of April, 1912, the said Circuit Court of Appeals rendered an opinion and judgment in the following language:

> "After mature deliberation of the questions arising on the present appeal, we are of the opinion that the demurrer interposed by the appellee to the bill of complaint was properly sustained. The decree of the trial Court dismissing the bill is therefore affirmed."

And thereafter your petitioner presented to said Circuit Court of Appeals a petition for rehearing, in due form, calling attention to the several grounds of demurrer, the first five relating to the question of jurisdiction in equity; the sixth, to the crux of the case—to wit, the riparian owner's rights, under the laws of Mississippi, between the shoreline and the thread of the stream—and the seventh to the construction of the deeds under which the complainant claimed, etc. And the Court was pressed to reconsider the cause, and, if it meant to sustain the decree of the Court below upon the ground that there was no jurisdiction in equity, it should say so, and not expose the complainant to a plea of *res adjudicata* in the event she should sue at law for the recovery of her property, or, rather, the value of her property, taken by defendants.

For it was manifest that, the demurrer being sustained generally, every question raised by it would be concluded.

But on the 10th day of May, 1912, the Honorable the Circuit Court of Appeals entered an order in said cause reading as follows:

> "The petition for a rehearing is denied."

Petitioner states that all of the foregoing will appear by reference to the printed transcript of the record and proceedings in said cause, and to copies of the briefs and petition for rehearing, herewith submitted and prayed to be considered as parts of this petition.

FOURTH. Petitioner further shows that, on account of the gravity and importance of the main question presented, and supposedly decided by the Circuit Court of Appeals, not alone to herself, but to all other owners of lands bordering the Mississippi River in the State of Mississippi, and on account of the apparent conflict between the State and the Federal Courts in the same territorial jurisdiction, she is advised that she may rightfully request this Honorable Court to review the decision and decree of the said Circuit Court of Appeals, and, to that end, that a writ of *certiorari* should issue to bring the record therein before your Honors.

And she respectfully maintains that said decree is erroneous in respect to every matter presented to it for decision.

She further maintains, with respect, that, if this Honorable Court shall be of the opinion that the judgment of the Court of Appeals and of said Circuit Court are not erroneous in so far as they may be limited to the question of jurisdiction in equity, she is entitled, on review, to have such limitations declared, and the dismissal of her bill placed solely upon that ground, so that, if she be the owner of the property in qestion, the defendants may not be permitted to make use of said decree as nullifying such right against them.

FIFTH. Your petitioner further represents that, aside from the question of jurisdiction in equity, the defendants contended in both the lower and appellate courts that no authority existed in the jurisprudence of Mississippi to

support the proposition that a grant of land lying along the Mississippi River carries title to the soil to the thread of the channel or beyond low-water mark; while your petitioner contended, and still insists, that the doctrine is settled by at least one, if not two, decisions of the High Court of Errors and Appeals of the State of Mississippi that such a grant does extend to the thread of the stream, the decisions referred to being *Morgan vs. Reading*, 3 Smedes & Marshall, 366, and *Magnolia vs. Marshall*, 39 Miss. 109. And it will be submitted that the statement or holding in the latter opinion that the riparian owner's title extended to the thread of the stream was not an *obiter dictum*, as contended for by the appellees' counsel, but was essential to establish ownership between high- and low-water mark on the Mississippi River, all as shown in the brief filed in support of this petition.

And petitioner states that she is informed, and verily believes it is historically true, that since the two decisions referred to riparian owners along the Mississippi River in that State have been uniformly regarded as the owners of the soil beneath the stream to the thread of the channel, and, consequently, that all towheads, islands and gravel deposits forming between such limits have been considered by all as the property of such riparian owners; so that, where such islands have come within the notice of Tax Assessors, they have been, under public authority, assessed to the front proprietors.

And it is respectfully represented that it is part of the juridical history of this country that the State of Mississippi is aligned with those States—*e. g.*, such as Illinois—which hold that a riparian proprietor on a stream, navigable in fact, but above tidewater, owns to the thread of the channel. And petitioner submits that it is altogether immaterial that any Federal or other State Court may consider that the common law of England has been misunderstood

or misapplied by Courts holding to the doctrine that on great navigable waters, like the Mississippi River, above the ebb and flow of the tide, a grant on their borders carries title *ad medium filum aquae;* for this Honorable Court has established the proposition that it must be left to the several States to construe and determine the effect of land grants bordering streams that are navigable in fact.

Your petitioner with respect states that not only would her property rights, as defined or understood by and under the decisions of the court of last resort in the State where they are situated, be destroyed, if the judgment of said Court of Appeals is permitted to stand, unrestricted and unexplained, but such conflict as would result from Courts acting within the same territorial jurisdiction, and likely to deal with the same character of litigation, would be most unseemly, and would produce confusion and uncertainty, which should be avoided, if possible.

Petitioner further shows that, while the main question raised by this record, which involves her ownership, under State authority, as sanctioned by this Honorable Court, is that which indicates the propriety of a review here, she maintains, for the reasons and upon the authorities set forth in the accompanying brief, that the aforesaid decree of the Circuit Court of Appeals of the Fifth Circuit is erroneous in all respects, and ought to be reviewed, corrected and reversed, and it directed to remand petitioner's cause to be proceeded with according to law.

Wherefore, in consideration of the premises, and as well for the reasons set forth in the brief filed in support hereof, your petitioner respectfully prays that a writ of *certiorari* may be issued out of and under the seal of this Court, directed to the United States Circuit Court of Appeals for the Fifth Circuit, commanding the said Court to certify and send to this Court, on a day certain to be therein designated, a full and complete transcript of the record and

all proceedings of the said Circuit Court of Appeals in said therein entitled cause, *Kate C. Archer vs. The Greenville Sand and Gravel Company et al.*, No. 2185, to the end that the said cause may be reviewed and determined by this Court, as provided by Section 240 of the Judicial Code; or that your petitioner may have such or other further relief or remedy in the premises as to this Court may seem appropriate and in conformity with the act of Congress in such case made and provided; and that the said judgment of the said Circuit Court of Appeals in the said case, and every part thereof, may be reversed by this Honorable Court.

And your petitioner will ever pray.

KATE C. ARCHER.

PERCY BELL,
Of Counsel.

By T. M. MILLER,
Attorney and Counsel for Petitioner.

STATE OF LOUISIANA,
PARISH OF ORLEANS.

Thomas Marshall Miller, being duly sworn, says that he is one of the attorneys and of counsel for Mrs. Kate C. Archer, the petitioner above named, and, as such, has personal charge for her of the proceedings to obtain the writ of *certiorari* as prayed for in said petition; that he has read the said petition by him subscribed, and that the facts therein stated are true, to the best of his information and belief.

T. M. MILLER.

Sworn to and subscribed before me this
the 28th day of May, A. D. 1912.

CHAS. F. FLETCHINGER,
Notary Public.

IN THE

Supreme Court of the United States

No. ——.

MRS. KATE C. ARCHER

versus

THE GREENVILLE SAND AND GRAVEL COMPANY *ET AL.*

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

STATEMENT.

The petitioner exhibited her bill of complaint in the State Court of Mississippi against the Greenville Sand and Gravel Company and the E. A. Voight Towing Company for a discovery and accounting touching large quantities of sand and gravel taken from land alleged to be her property beneath the waters of the Mississippi River, lying between the thread of the channel and her shore line. The bill averred that complainant had no means of knowing

the quantity so taken and sold by defendants, to unknown persons for unknown prices, and that the facts were peculiarly within the knowledge of the defendant. In darraigning her title to the riparian property, the complainant exhibited with her bill, as parts thereof, a number of deeds conveying the land claimed to be owned by her along the river, by particular description, and stating the acreage, adding, "except such parts thereof as have been washed away by the river."

It was further alleged that the trespass was a continuing one, and an injunction was prayed for.

Defendants having removed the cause into the Circuit Court of the United States, interposed a demurrer to the bill, upon the grounds following:

(*a*) There is no equity in the bill.

(*b*) The complainant has no right to a discovery, because there is no ground for equitable relief.

(*c*) The continuing trespass complained of is not of the character that entitles complainant to equitable relief.

(*d*) Complainant has no right to an accounting in equity.

(*e*) The complainant has a complete and adequate remedy at law.

(*f*) The complainant has no title to the lands extending under the Mississippi River to the thread of the stream beyond the low-water mark, nor to the sand and gravel thereon.

(*g*) Even if riparian owners on the Mississippi River own the bed of the river to the middle thereof, complainant's bill shows that she is not a riparian owner, and that the land conveyed to her is limited in the grant to the river bank and that she has no title to the land beyond nor to the sand and gravel on the river bed.

(*h*) It is not alleged in said bill that said sand and gravel were taken from that part of the bed of the river which was east of the thread of the stream or middle of the river at the time complainant acquired title to the lands described in the bill.

Nor is it alleged in said bill that the thread or middle of the stream is at present time where it was when complainant acquired title to the lands described in the bill, nor is it shown that there has been no change since said time in the thread of said stream affecting the land from which said gravel is alleged to have been taken.

(*i*) And for other causes to be assigned at the hearing.

See Tr., pp. 2, 6 and 16.

A decree was entered sustaining the demurrer generally, no ground being specified and no reason being assigned, and also dismissing the bill. (Tr., p. 18.)

An appeal was taken by Mrs. Archer to the Circuit Court of Appeals, which, after full argument, filed an opinion merely declaring that, after mature deliberation, no error was found, and, therefore, affirmed the decree appealed from.

A petition for rehearing was duly presented to the Court of Appeals, and it was urged to declare whether or not it was meant to affirm the decree of the lower Court upon the principal question involved—that is to say, the property rights of complainant in the sand and gravel on the river bottom in front of her lands and within the thread of the channel—or merely to maintain the demurrer in so far as it excepted to the jurisdiction in equity.

The petition was denied, leaving the decree of the lower Court and of the appellate Court to apply to any one of the several grounds of demurrer.

ARGUMENT.

The record raises two points of law:

FIRST. Was Mrs. Archer the owner of the sand and gravel forming part of the bed of the Mississippi River within the thread of the channel and next to her shore line, and

SECOND. Was she entitled to a discovery and accounting from the defendants touching the sand and gravel removed and disposed of by them, with an injunction against the continuing thepass?

Upon the first point, it is maintained that the then Circuit Court and the Court of Appeals disregarded the established law in Mississippi, as well as the decisions of this Court by denying the complainant's rights beyond the shore proper, for the High Court of Errors and Appeals of Mississippi, as early as 1844, in the case of *Morgan vs. Redding*, 3 Smedes & Marshall, 366, established the doctrine that the rights of a riparian owner along the Mississippi River are determinable according to the common law, and that by the common law the front proprietor on streams not deemed navigable in the technical sense because above tide water, own to the thread of the channel, whereas, on navigable streams ownership terminated at ordinary high-water mark. And this Court has repeatedly held that the effect of grants of land bordered by streams, whether navigable or

not, are to be determined by the law of the State, in which the lands lie.

See *Kaukuna Co. vs. Greenbay Co.*, 142 U. S. 254 (35 Law. Ed. 1004); also, see *St. Louis vs. Rutz*, 138 U. S. 226 (34 La. Ed. 941); *Gibson vs. U. S.* 166 U. S. 72; *Shively vs. Bowley*, 152 U. S. 371 (11 Sup. Ct. Reps. 808, 838); *Hardin vs. Jordan*, 140 U. S 371 (11 Sup. Ct. Reps. 808, 838); *Yates vs. Milwaukee*, 10 Wall. 497; *Jones vs. Soulard*, 24 How. 41; *Packer vs. Bird*, 137 U. S. 661.

It is true that in the *Morgan case* (1844) the High Court of Errors and Appeals was dealing with the right of a riparian owner between high and low water mark, and remarked in the opinion that it was unnecessary to decide whether or not his right extended beyond low-water mark. It was, therefore, contended by counsel for these defendants that the Mississippi Court was not committed to the doctrine that a riparian owner's title reached to the thread of the channel, and the same statement was applied to the later case of the *Steamboat Magnolia vs. Marshall*, 39 Miss. 109, decided in 1860, for the reason that the right to make use of the river bank between high and low water mark was claimed by the owners of the vessel as against the demand of the riparian proprietor; but, an analysis of the opinion in the later case will demonstrate that the holding of the Court, to the effect that a riparian owner's title extended to the thread of the stream, was essential in order to maintain his claim to the land between high and low water mark. And, in fact, that the right of property between high and low water mark was a corollary of the proposition that his right extended to the thread of the channel. In short, it was

only because the greater included the lesser that the right to the shore was maintained.

The Court maintained the distinction between navigable streams in the technical sense—that is to say, within the ebb and flow of the tide—and such as were navigable in fact, but deemed nonnavigable in the sense explained because above tide water; and proceeded to hold that, in respect to navigable streams, as defined, the riparian owner held only to high-water mark; whereas, a grant of land bounded "by" or "on" a fresh-water stream, whether in fact capable of navigation or not, conveys the soil *ad usque medium filum*, and, *of course*, conveys to the grantee the shore between high and low water mark.

Wherefore, it is erroneous and misleading to speak of the Mississippi decision, maintaining the riparian proprietor's title to the thread of the stream, as an *obiter dictum* because the action arose out of an asserted public right to the use of the shore between high and low water mark.

It may be safely asserted that the rights of riparian owners along the Mississippi River to the soil beneath the river and lying between the thread of the stream and the shore, have never been questioned since the decisions referred to, which were rendered more than a half century ago, and it is believed to be a fact, so notorious as to form part of the history of that State, that such riparian owners have been deemed and treated as having title to the small islands that have formed, from time to time, in the river adjacent to their shore line, as well as of the valuable formation of sand and gravel on the bottom and within the thread.

It is submitted that, so far as the Feneral Courts are concerned, it is wholly immaterial whether the reasoning of the Mississippi Court compares favorably or not with that

of other State Courts which have declined to take the same view respecting riparian rights in similar circumstances. Hence, the merit of the two classes of decisions—that is to say, those maintaining private ownership or public ownership between the shore and the middle of the stream, need not be considered. But, with all respect to the Court of Appeals and to the Circuit Court, it is submitted they had no right to regard the question as *res nova* in Mississippi.

The decision in this cause, if unreversed and unrestricted, would deprive the petitioner of property deemed in Mississippi to belong to persons in her situation and would give to the State what it has never claimed. And so, it is submitted that, should this Honorable Court be of the opinion that Mrs. Archer was not entitled to a discovery and accounting in equity upon the facts and circumstances stated in her bill, the writ of *certiorari* should still be granted, to the end that the judgment of the Court of Appeals be set aside and it directed to dismiss the bill for want of equity, and without prejudice.

The complainant has no means of knowing whether the decision complained of was intended to conclude her on the merits or to deny her right to equitable relief. And it would seem that the conflict of decisions thus made to appear between the State and Federal Courts, in Mississippi, and the great public importance of the question presented, would indicate the propriety of the highest court in the land reviewing the case under consideration.

Now, on the question of complainant's equity, opposing counsel labored under the misapprehension that this was a trial of title and ignored the fact that the defendants had no claim nor showed the faintest shadow of a right to go upon the lands. The demurrer admits the fact of the com-

plainant's being the owner of the land and only brings in question the conclusions of law. The defendants had no claim upon the lands under color of any deed or conveyance and it is submitted are merely naked trespassers. The title to the bed of the stream must be in some one, and the Mississippi Court, it is submitted, has decided that it is in appellant, and certainly not in the State of Mississippi. The defendants here do not for a monent claim that it is in them. They are not permanently on the land; they merely, according to the bill, the facts of which are admitted by the demurrer, are recurring and continuing trespassers; going upon the land and taking sand and gravel therefrom, without shadow of title, and it is to prevent this recurring trespass that the injunction is sought. It is submitted that the thought of bringing an action of ejectment against the owner of a dredgeboat anchoring, from time to time, in a navigable stream, covering the complainant's land, would be excessively odd, to say the least.

> "Where trespass to property is a single act, and is temporary in its nature and effects, so that the legal remedy of an action at law for damages is adequate, equity will not interfere; but if the trespass is continuous in its nature, and repeated acts of trespass are done or threatened, although each of such acts taken by itself, may not be destructive, or inflict irreparable injury, and the legal remedy may, therefore, be adequate for each single act as if it stood alone, the entire wrong may be prevented or stopped by injunction. (1 Pom. Eq. Jur., Sec. 245; 3 Pom. Eq. Jur., Sec. 1357.) The separate remedy for each of such trespasses would not be adequate to relieve the injured party from the expense, vexation and oppression of numerous suits against the wrongdoer in regard to the same subject-matter. The

ends of justice require, in such case, that the whole wrong shall be arrested and concluded by a single proceeding. And such a relief equity affords, and thereby fulfills its appropriate mission of supplying the deficiencies of legal remedies."

Warren Mills vs. N. O. Seed Co., 65 Miss. 391; 4 So. 298.

"When the trespasses complained of are caused by the separate acts of individuals, a multiplicity of suits may be caused to the complainant either because the defendants are numerous, or because a single defendant does the same or similar acts repeatedly. The principle involved in all such cases is the same, and an injunction should issue. If the defendant manifests a purpose to persist in perpetrating his unlawful acts, the vexation, expense and trouble of prosecuting the actions at law make the legal remedy inadequate and justify the complainant in coming into equity for an injunction."

Pom. Eq. Jur., Vol. V, Sec. 496.

Reference is made also to Cyc., Vol. 22, pp. 836, 760 *b*, 768 *b*, and 826 *b*, and the array of authorities which are cited in support of the proposition that, in the circumstances here shown, an injunction is warranted and necessary. The allegations of the bill make out a case of continuing trespass by repeated invasions of appellant's land and recurrent visitation thereof. Frequent dredging is a continuing, not a continuous, trespass or a permanent occupancy. It is submitted that a court of equity is the only possible forum in which the complainant can obtain the relief to which she is entitled. There is no question of title involved, no color of title being asserted or suggested in the premises, and the discovery sought is a matter entirely within the knowledge of the defendants, who are naked trespassers and

from whose continuing trespasses only an injunction will give relief. And, of course, where equity assumes jurisdiction for one purpose, it would retain it in order to grant full relief.

Where an injunction is sought and is the only remedy which will give relief, and the party is entitled to a discovery, it is maintained the Court's jurisdiction in equity cannot admit of serious question.

Opposing counsel below, in denying the jurisdiction in equity, thought that, inasmuch as a statute of Mississippi gives parties the right to a discovery in actions at law, there could be no resort to a court of equity for such purpose. But it has never been considered that the enlargement of a legal remedy destroyed one already existing in equity, aside from which, it may be remarked, that the statutory remedy would be of little avail where a plaintiff should be unable to formulate his demand for lack of information peculiarly within the knowledge of his adversary.

Taking up the defendant's contention that the grant in the original deeds in this case has an express limitation, the attention of the Court is directed to the fact that the deeds convey all of certain sections, "except what had previously caved off into the Mississippi River," and certain lots "except those previously sold."

It is maintained that this was a limitation on the amount of land conveyed and a very reasonable precaution on the part of the grantor against an action for breach of warranty, as he conveyed the sections by number, and is not a limitation at all on the boundary or a reservation thereto, any more than is the limiting clause as to the lots, which is of the same effect and indicates the meaning of the first clause.

These words cannot constitute an exception for the reason that an exception must be, first, part of the thing granted; second, in existence; third, not uncertain. These lands having been, by the words of the deed, washed away by the Mississippi River, were not part of the thing granted, were not in existence, and the amount of the supposed exception being not stated and being impossible of fixation, at this time, the quantity excepted cannot be known. The Supreme Court of Mississippi says in *Moore vs. Lord*, 50 Miss. 229, "an exception which does not appear to be a part of the thing excepted, nor belong to the grantor, is not good." It is, therefore, submitted that this could not be a valid exception. The grantee would take the entire tract. The uncertainty of the exception would invalidate the exception, but not the deed. (*McAllister vs. Hosea*, 71 Miss. 256.) The exception must be construed most favorably to the grantee. (*Jackson vs. Hudson*, 3 Am. Dec. 500.)

The words relied upon cannot constitute a reservation of title in the grantor, because, first, the lots previously sold explain the words used, and, second, because it is not a new estate or right created at the time of the grant. It is, therefore, submitted that, as the words cannot constitute a valid exception nor a reservation, that they are, perforce, to be construed as meaning simply and solely that the grantor wished to avoid any liability for the conveyance of the whole when part of it had washed away, which part he expressly did not grant, as it was not in existence.

Under the decisions the riparian right attaches automatically to the remaining land as the land in front of it caves off, and, unless there be an expressed reservation of the riparian right, which there was not here, such right passes by the general words of the conveyance. By the language of the deeds these lands excepted were no longer

in existence, and certainly a riparian right could not attach them. As to the effect of this shifting the Court is referred to *Nebraska vs. Iowa*, 143 U. S. 159 (36 Law. Ed. 180). As to the alleged limitation in the grant, and meaning the general words of conveyance, the Court is referred to the various opinions hereinabove quoted, especially to paragraph 6 of the syllabus in 39 Miss. 109.

Upon the whole record it is respectfully submitted that a writ of *certiorari* ought to issue as prayed for, and thus bring up the important matters under consideration for authoritative and final decision by this Honorable Court, to the end that the judgments complained of may be reversed in whole, or, in the alternative, so modified as to preserve the rights of the petitioner under the laws of the State of Mississippi.

Respectfully submitted,

PERCY BELL,

T. M. MILLER,

Attorneys for Petitioner.

T. M. MILLER,

Of Counsel.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1913.

No. 271.

KATE C. ARCHER,

Petitioner,

versus

THE GREENVILLE SAND AND GRAVEL COMPANY *ET AL.*,

Respondents.

BRIEF FOR PETITIONER.

PERCY BELL,
T. M. MILLER,
Attorneys for Petitioner.

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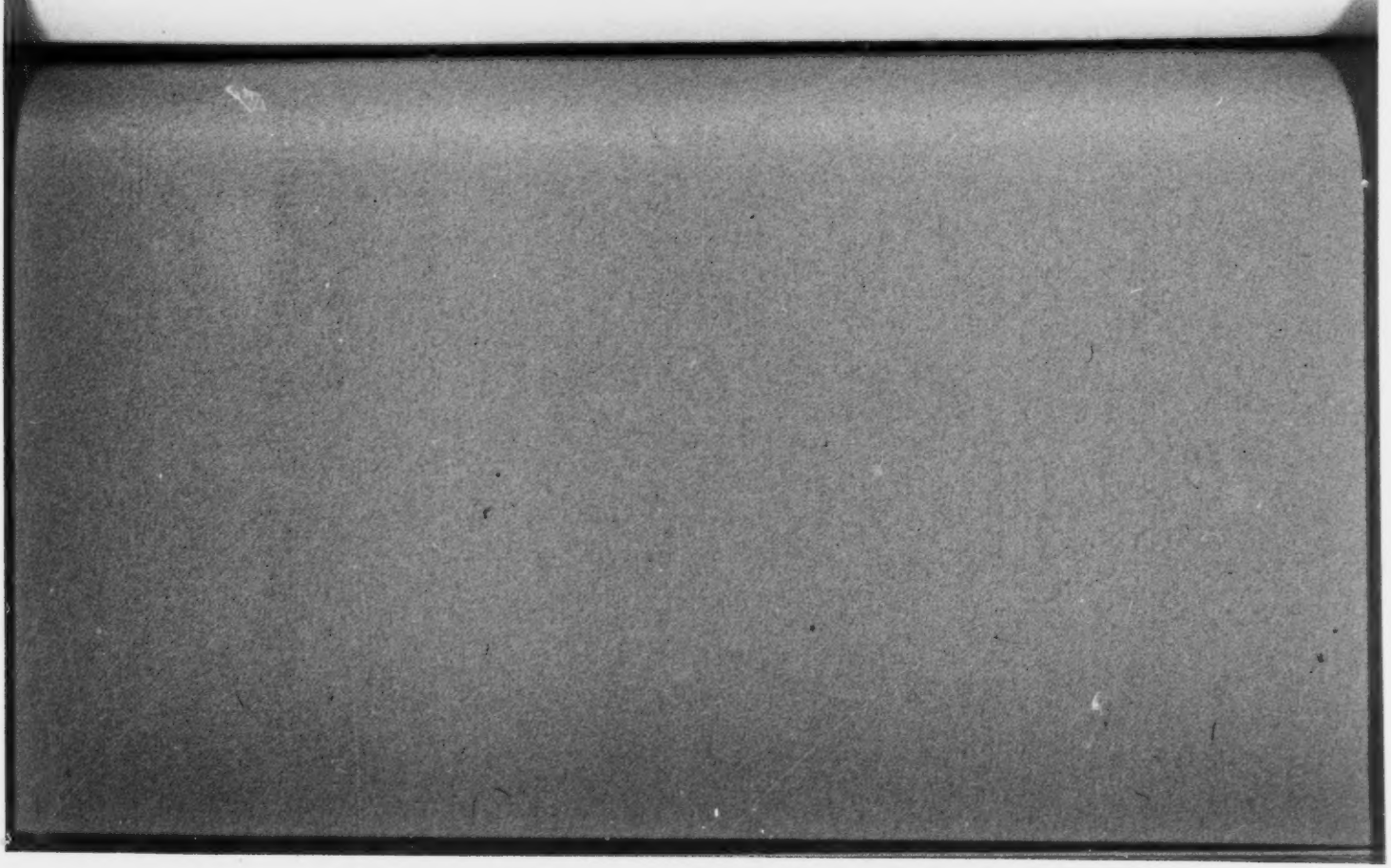

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Respondents.

BRIEF FOR PETITIONER.

STATEMENT OF THE CASE.

The petitioner, Mistress Archer, exhibited her bill in the Chancery Court of Washington County, Mississippi, against the respondents, alleging the following facts:

1.

(*a*) That she owned in fee simple the tract of land described in the bill lying along the bank of the Mississippi River.

(*b*) That her title, under the laws of the State of Mississippi, extended to the thread of the channel of the Mississippi River, and that between the thread of the channel and the shore were large deposits of sand and gravel, in front of her lands.

(*c*) That the defendant, the Greenville Sand and Gravel Company, having entered into a contract with the Yazoo and Mississippi Valley Railroad Company to furnish it a large quantity of gravel, employed its codefendant, in the year 1909, to dredge the same in front of complainant's land and within the thread of the channel, the same being her property. And that the latter had accordingly dredged and removed from complainant's said premises large quantities of sand and gravel, and delivered the same to the former, which had, in turn, disposed of it to said railroad company and to other persons.

(*d*) The bill closing with the following allegations:

> "That the defendants refused either to cease dredging the sand and gravel or to make any compensation to your complainant therefor, and are constantly dredging the said sand and gravel; that your complainant does not know how much of the said sand and gravel has been taken from her said land, nor to whom the same has been sold, but she alleges and charges that great quantities of the said sand and gravel have been dredged from her said land, and that a quantity was dredged and removed, the amounts of which are peculiarly within the knowledge of defendants; that the dredging aforesaid constitutes a continuing trespass upon the lands and property of the complainant, and that she is entitled to have the same restrained by this Honorable Court, and to a discovery of the amount of sand and gravel so taken

and the price for each sale by the defendant, and an accounting therefor; and a decree against the defendants therefor; that she is remediless except in a court of equity to obtain the relief to which she is entitled."

(*e*) Sundry deeds, constituting complainant's muniments of title, were exhibited with the bill.

NOTE.—While the bill alleged ownership in complainant of certain tracts lying along the Mississippi River west of the public levee, excepting two strips of one hundred feet width each, the deeds, or some of them, embracing the same land by numbers, contained this expression: "Except such parts thereof as have been washed away by the river." The bill prayed for a discovery and accounting for the material taken and for an injunction against the continuing trespass. (Tr., pp. 2-9.)

The cause having been removed into the then Circuit Court of the United States for the Southern District of Mississippi, the defendants interposed a demurrer to the bill upon numerous grounds, which need not be here copied in detail. In substance, they denied the jurisdiction of the Court to compel an accounting and discovery; denied the complainant's right to an injunction; denied that the land of a riparian proprietor, under the laws of Mississippi, extended beyond low-water mark on a navigable stream; maintained that the bill itself showed that the river bank was the limit of complainant's grant; asserted that the bill failed to allege that the sand and gravel were taken from the river bed east of the thread of the steam or middle of the river at the time the complainant acquired title to the lands described in the bill.

2.

The demurrer closed with the following:

> "Nor is it alleged in said bill that the thread or middle of the stream is at the present time where it was when complainant acquired title to the lands described in the bill, nor is it shown that there has been no change since said time in the thread of said stream affecting the land from which said gravel is alleged to have been taken."

NOTE.—The demurrer, in short, essayed to deny complainant's right to the relief sought, first, because she had a plain, adequate and complete remedy at law, and was, therefore, without equity; and, second, because she did not, by her bill, and as a matter of law, show ownership in herself of the property in question. (Tr., pp. 14, 15.)

The Circuit Court sustained the demurrer of defendants and dismissed the bill, assigning no reason. (Tr., p. 15.)

3.

Complainant appealed to the Circuit Court of Appeals for the Fifth Circuit, which Court affirmed the decree of the Circuit Court, assigning no other reason than its failure, "after mature deliberation," to discover any error. (Tr., p. 19.)

4.

A petition for a rehearing was presented to the Court of Appeals, in which that Court was earnestly requested at least to say whether it was meant to hold against complainant's title or merely to deny relief in equity; but the petition

was simply denied, leaving the record to stand as *res judicata* on both propositions. (Tr., pp. 20-22.)

The cause is here on a writ of *certiorari*.

ARGUMENT.

It is maintained that the Court erred in sustaining the demurrer to the bill of complaint, first, because, upon its allegations, admitted by the demurrer, the complainant's title extended to the thread of the channel, and, therefore, she owned the gravel and sand that were being dredged and rmoved by the defendants; and, second, that, being without an adequate remedy at law, she was entitled to injunctive relief and to a discovery and accounting for the gravel and sand taken from her premises. Or, if mistaken in supposing that she was without adequate remedy at law, then the Court below erred in not basing its decree of dismissal solely upon the ground that she had mistaken the forum, leaving her to pursue the legal remedy. In support of petitioner's contention, the following propositions of law are stated:

1. The construction of a grant of lands bordering upon a navigable stream is left to the Courts of the several States.

2. It is established by the decisions of the highest Court in Mississippi that a grant of lands bounded by the waters of a navigable stream above tide water extends to the thread of the channel.

3. Where the bill of complaint alleges ownership of a given tract of land lying upon a navigable stream, that the continuing trespasses complained of are committed upon the

river bed in front of complainant's land between the shore and the thread of the channel, and muniments of title are exhibited with the bill which *except* so much of the land embraced within the description as may have been washed away or caved into the river, such an exception cannot interpose a separate ownership or reservation of the bed of the stream beyond what is left of the shore line.

4. In the very nature of things, there can be no adequate remedy at law to recover the value of property taken by continuing trespasses from the bottom of the river where the defendant alone knows the kind and quantity of the material taken and disposed of. Hence, the right to resort to a court of equity for a discovery and accounting. Nor would an action of ejectment to establish the complainant's legal title be appropriate in a case where the only occupation of his land occurs in the course of trespasses committed by anchoring a dredgeboat in a navigable stream and taking up material from the bottom. A writ of possession in such a case would be unheard of.

5. The fact that a State statute may enlarge a legal remedy by providing for a discovery in an action at law does not affect a pre-existing right to proceed in equity.

It was contended by counsel for defendants in the court below that the reason for the rule of construction which, at common law, extended the title of the grantee of lands bounded by a stream in fact navigable, although not affected by the tides of the ocean, to the thread or middle of the stream, having ceased, the rule itself ceases, and, therefore, the grants in question are limited by low-water mark on the Mississippi River. And while it was not controverted that, according to the decisions of this Court, it is left to the Courts of the several States to define or construe such

grants, it was sought to treat the matter as *res nova* in Mississippi, counsel asserting that so much of the opinion of the High Court of Errors and Appeals of that State in the thoroughly considered case of *Steamboat Magnolia vs. Marshall*, reported in 39 Miss. 109 (1860), as declared the riparian grant carried title to the thread of the channel of the Mississippi River was *obiter dictum*, for the reason that the point involved was merely the right of the riparian owner to charge for the use of the shore between high- and low-water mark.

While it is generally true that propositions of law, asserted in a judicial opinion, outside of or beyond the scope of the question immediately submitted for decision, may be considered as *obiter*, that statement can have no application to the Mississippi decision referred to, for the simple reason that it was only by applying the common law of England to the case then in hand that the riparian owner's rights to the shore between high- and low-water mark could have been maintained, for, according to the view taken, it was only because a grant of land on a fresh-water stream extended to the thread of the channel that there could be any private ownership between high- and low-water mark. It was as if the Court had said the greater includes the less. In short, the Mississippi Court aligned itself with those of other States in applying the common law strictly to the situation, and in refusing to hold that the public character and use of our great rivers should bring them within the category of waters "technically navigable."

It is distinctly asserted in *Magnolia vs. Marshall* that the Mississippi River is not, above tide water, a navigable stream in the technical sense of that term, and is, in all respects, subject to the rules of the common law regulating

the rights of the public and of riparian proprietors in fresh-water streams capable of being navigated.

To the same effect is the case of *Morgan vs. Reading*, 3 Smedes & Marshalls (Miss. 1844), 366. In the latter case the decisions of the Ohio Court were referred to with approval, where it was said:

> "The ordinance of 1787 for the government of the Northwestern Territory, which declares that the navigable waters leading into the Mississippi shall be common highways, and forever free, does not impair or abolish the common-law principle that he who owns the bank owns to the middle of the river, subject to the easement of navigation."

It is believed that an examination of the *Magnolia case*, especially, will leave no room to doubt that the jurisprudence of Mississippi accords with the second proposition above stated and contended for by petitioner.

Both the earlier cases were referred to in the case of *N. O. M. & C. R. R. vs. Frederic*, 46 Miss. 9, 10, as establishing the doctrine of riparian rights in Mississippi; and, right or wrong, it cannot be fairly said the decision in 1860 did not establish a rule of property.

Again, referring to the argument of counsel that the *Magnolia* decision, in so far as it carried the riparian grant to the thread of the channel, was *obiter*, it is repeated that the establishment of Marshall's ownership between high- and low-water mark was stated as a necessary conclusion following the major premise. The reasoning of the Court is a perfect syllogism.

And the Court in that case reviewed the then conflicting authorities in this country having relation to the subject.

and expressly rejected the argument made by defendant's counsel in the court below.

All the writers referring to this subject place Mississippi with the authorities which apply the common-law rule strictly to non-tidewater streams, whether, in fact, navigable or not.

A list of the authorities on both sides of the question will be found in Notes 10 and 11, pp. 895, 896, 5 Cyclopedia of Law and Procedure.

And while this Court has strongly approved the rule repudiated by the Supreme Courts of Mississippi and many other States, it has left it to the Courts of the several States to determine the effect of riparian grants.

> See *Kaukuna Co. vs. Greenbay Co.*, 142 U. S. 254 (35 Law. Ed. 1004); also, see *St. Louis vs. Rutd*, 138 U S.. 26 (34 L. Ed. 941); *Shively vs. Bowley*, 152 U. S. 1; *Hardin vs. Jordan*, 140 U. S. 371; *Yates vs. Milwaukee*, 10 Wall. 497; *Jones vs Soulard*, 24 How. 41; *Packer vs. Bird*, 137 U. S. 661.

As to the Effect of Excepting, in a Deed of Conveyance, of Lands on the Mississippi River, Such Portion as May Have Washed Away or Caved Into the River.

After insisting in the court below that the Mississippi Court had not committed itself to the strict application of the common-law rule respecting grants of land on navigable streams above tidewater, counsel asserted that the language in some of the deeds excepting such parts of the land

as had caved into the river had the effect of reserving title in the grantors of all beyond the then existing shore line, and the conclusion was drawn that other persons than complainant must own the bed of the river at such places.

The following extract is made from the brief of respondents' counsel in the Court of Appeals:

> "The section as originally surveyed contained land which thereafter caved off into the river, and, in conveying the sections by number, without any further statement limiting the land conveyed, all of the sections, both that part that had not caved off and that part that had caved off into the river, and *constituted a part of the river bed at that point*, would have passed to the grantee, and, by excepting the latter from the conveyance, the title thereto remained in the grantor."

It is submitted that, if the proposition of law involved in this statement has any merit, it cannot be availed of by demurrer to a complaint alleging ownership of the sections described with an allegation of a trespass in front of complainant's premises and within the thread of the channel. For, if complainant failed to acquire title beyond the shore line at a point where caving had occurred, that circumstance would not militate against her title to the river bed elsewhere.

But, if it be true, as it is believed the Court maintained in *Magnolia vs. Marshall*, that the grant of lands on the river carried title to the bed of the stream, it is inconceivable that language in a deed excepting such portions as had caved off was meant to limit the grant to the shore line. The plain import of the language is a mere reference to that which no longer exists, and could have had no rela-

tion to the river bed proper, for that certainly had not *caved into* the river; hence, counsel are mistaken in supposing it formed part of the river bed.

It is universally known that when portions of the bank along a swift stream like the Mississippi cave off, the earth at once disintegrates, is converted into silt, and carried away, to be deposited no one can say where; whereas, the argument of counsel assumes that in such case the land has simply sunk below the surface, forms part of the river bed, is still a part of the section mentioned in the deed, and the locality where the sunken land is supposed to be is carved out of or reserved from the general description of the land.

It will be remarked that there was no exception of the land beneath the water. But, quite aside from all this, if counsel were right, and the trespassing was done by their clients at the places embraced within the supposed exceptions, the bill should have been answered so as to present the issue of fact.

Again referring to defendant's contention that the grant in the original deeds in this case has an express limitation, the attention of the Court is directed to the fact that the deeds convey all of certain sections, "except what had previously caved off into the Mississippi River," and certain lots, "except those previously sold."

It is maintained that this was a limitation on the amount of land conveyed, and a very reasonable precaution on the part of the grantor against an action for breach of warranty, as he conveyed the sections by number, and is not a limitation at all on the boundary or a reservation thereto, any more than is the limiting clause as to the lots, which is of the same effect and indicates the meaning of the first clause.

These words cannot constitute an exception for the reason that an exception must be, first, part of the thing granted; second, in existence; third, not uncertain. These lands, having been, by the words of the deed, washed away by the Mississippi River, were not a part of the thing granted; were not in existence; and, the amount of the supposed exception being not stated, and being impossible of fixation at this time, the quantity excepted cannot be known.

The Supreme Court of Mississippi says in *Moore vs. Lord*, 50 Miss. 229:

> "An exception which does not appear to be a part of the thing excepted, nor belong to the grantor, is not good."

It is, therefore, submitted that this could not be a valid exception. The grantee would take the entire tract. The uncertainty of the exception would invalidate the exception, but not the deed.

McAllister vs. Hosea, 71 Miss. 256.

The exception must be construed most favorably to the grantee.

Jackson vs. Hudson, 3 Am. Dec. 500.

The words relied on cannot constitute a reservation of title in the grantor, because, first, the lots previously sold explain the words used, and, second, because it is not a new estate or right created at the time of the grant. It is, therefore, submitted that, as the words cannot constitute a valid exception or a reservation, they are, perforce, to be construed as meaning simply and solely that the grantor wished to avoid any liability for the conveyance of the whole when part of it had washed away, which part he expressly did not grant, as it was not in existence.

Under the decisions, the riparian right attaches automatically to the remaining land as the land in front of it caves off, and, unless there be an expressed reservation of the riparian right, which there was not here, such right passes by the general words of the conveyance. By the language of the deeds, these lands excepted were no longer in existence, and certainly a riparian right could not attach to them. As to the effect of this shifting, the Court is referred to *Nebraska vs. Iowa*, 143 U. S. 159 (36 Law. Ed. 180).

The trustee's deed from Valiant to Terry (Tr., p. 6) contains no warranty, because made by a trustee, who conveys as trustee only; the conveyance made from the Greenville Land and Manufacturing Company to petitioner (Tr., p. 9) contains a warranty and subsequent exceptions similar to that of the other deeds.

The argument of counsel as to the title to the river bed remaining in Roach, the original grantor, by reason of the alleged exception, is directly in the face of the case of *Wells vs. Bailey*, 3 Am. St. Rep. 348. Clearly, the overburden being washed away, the riparian right attached to the river bed that was beneath it. Even though at one time A was the riparian owner, and, as such, owned the bed of the stream, if his land subsequently washed away, and B's land was then behind his, then B becomes the riparian owner, and the bed belongs to B, notwithstanding it may lie within the former boundaries of A's land, which was washed away.

See *Wells vs. Bailey*, 3 American State Reports, 348; *Bellefontaine Co. vs. Neidringhaus*, 72 Am. State Reps. 369; *Nebraska vs. Iowa*, 143 U. S. 159.

As to Jurisdiction.

It is maintained that equity alone can give relief to petitioner, and that, if the Court below meant to hold that it was without jurisdiction, it was a grave error.

Petitioner is the owner of the bed of the stream, subject to an easement in the public to use the stream for purposes of navigation, and, incidentally, the United States has the right to dredge the bottoms; but no person may, because of the public easement, invade the premises for private gain.

Respondents are trespassers, and, under the facts in this case, their acts constitute a recurring trespass, a continuance of which would be avoided by the issuance of the injunction prayed, and payment for material taken compelled through a discovery and accounting, as prayed for.

Opposing counsel labored under the misapprehension that this was an attempt to try title, and ignored the fact that the defendants had no claim or shadow of right to go upon the lands. Defendants having no color of title, they were naked trespassers. They are not permanently on the land; they are, according to the bill, merely recurring and continuing trespassers; going upon the land and taking gravel and sand therefrom without pretense of title, not for the Government, nor to dredge a channel, but for their own profit; and the injunction is sought to prevent this recurring trespass.

The case of *Warren Mills vs. N. O. Seed Co.*, 65 Miss. 391, is in point:

> "The allegations of the bill of repeated, willful and continuous wrong, committed and threatened by appellants, warrant the issuance of the injunction. The jurisdiction of equity in such cases cannot be doubted."

It would be farcical to bring ejectment against the owner of a dredgeboat, anchoring, from time to time, in a navigable stream, in order to determine the plaintiff's right to the river bed.

> "Where trespass to property is a single act, and is temporary in its nature and effects, so that the legal remedy of an action at law for damages is adequate, equity will not interfere; but if the trespass is continuous in its nature, and repeated acts of trespass are done or threatened, although each of such acts taken by itself may not be destructive or inflict irreparable injury, and the legal remedy may, therefore, be adequate for each single act as if it stood alone, the entire wrong may be prevented or stopped by injunction."
>
> 1 Pom. Eq. Jur., Sec. 245; 3 Pom. Eq. Jur., Sec. 1357.
>
> "The separate remedy for each of such trespasses would not be adequate to relieve the injured party from the expense, vexation and oppression of numerous suits against the wrongdoer in regard to the same subject-matter. The ends of justice require, in such case, that the whole wrong shall be arrested and concluded by a single proceeding. And such a relief equity affords, and thereby fulfills its appropriate mission of supplying the deficiencies of legal remedies."
>
> *Warren Mills vs. N. O. Seed Co.*, 65 Miss. 391.

It will surely not be contended that the petitioner should go into a court of common law and sue for each of the many trespasses, for, if she is entitled to recover for any one of them, she is surely entitled to an injunction forbidding a continuance of them.

> "When the trespasses complained of are caused by the separate acts of individuals, a multiplicity of

suits may be caused to the complainant either because the defendants are numerous or because a single defendant does the same or similar acts repeatedly. The principles involved in all such cases are the same, and an injunction should issue. If the defendant manifests a purpose to persist in perpetrating his unlawful acts, the vexation, expense and trouble of prosecuting the actions at law make the legal remedy inadequate and justify the complainant in coming into equity for an injunction."

Pom. Eq. Jur., Vol. V, Sec. 496.

See, also, Cyc., Vol. 22, pp. 836, 760 b, 768 b, 771 a and 826 b, and the array of authorities there cited in support of the proposition that, in the circumstances here shown, an injunction is warranted and necessary.

"(IV) REPEATED OR CONTINUING TRESPASSES.

Where acts of trespass are continuous or constantly recurring, whereby, if permitted to continue, irreparable injury may result, as where the continuous wrongful invasion of plaintiff's right might ripen into a prescriptive right, an injunction will lie to restrain such trespasses, both on the ground that the remedy at law by suits for damages is inadequate and to prevent a repetition or multiplicity of such suits."

22 Cyc. 836.

"b. The granting of an injunction is not governed by the mere value of the property, nor is it limited to cases where damages could be recovered in an action at law; and an adverse use may be restrained, even though the damage suffered is small, where its continuance might ripen into a right."

Ib., p. 760.

"MULTIPLICITY OF ACTIONS BETWEEN TWO PARTIES. It is now well settled that where an injury committed by one against another is continuous, or is being constantly repeated, so that the complainant's remedy at law requires the bringing of successive actions, that remedy is inadequate, and the injury will be prevented by injunction. If repeated trespasses are threatened, for which a remedy at law could be obtained only through a multiplicity of suits, making the expense excessive and disproportionate to the damage, an injunction will commonly be issued. Especially is this true when the acts complained of constitute a willful invasion of the complainant's right."

Ib., p. 768.

"To defeat the equitable jurisdiction, it is not sufficient that the law should merely afford some remedy; that remedy must be as practical and efficient as is the equitable remedy in rendering justice and as prompt in its administration. An injunction is in many cases more prompt and efficient than any legal remedy, and because of this promptness and efficiency there is a strong tendency to grant injunctions where formerly the remedy at law would have been deemed fully adequate."

Ib., p. 771.

"b. When the complainant is in possession and seeks to restrain a trespass by one who claims under color of right, the injunction will usually be granted where the threatened acts may tend to the destruction of the inheritance, or would result in a multiplicity of suits, or would produce a confusion of boundaries."

Ib., p. 826.

Far greater is the right to an injunction where the trespasser is without color of title.

The allegations of the bill make out a case of continuing trespass by repeated invasions of petitioner's land and recurrent visitation thereon. Frequent dredging is a continuing, not a continuous, trespass or a permanent occupancy. It is submitted that a court of equity is the only possible forum in which the complainant can obtain the relief to which she is entitled. There is no question of title involved, no color of title being asserted or suggested in the premises, and the discovery sought is of a matter entirely within the knowledge of the defendants, who are naked trespasses, and from whose continuing trespasses only an injunction will give relief. And, of course, where equity assumes jurisdiction for one purpose, it would retain it in order to grant full relief.

Where an injunction is sought, and is the only remedy which will give relief, and the party is entitled to a discovery, it is mantained the Court's jurisdction in equity cannot admit of serious question.

> "Though discovery is not the sole ground of equity jurisdiction in matters of account, it was one of the sources thereof where there was a want of power to draw out the proofs from the consciences of the parties. And where plaintiff is entitled to a discovery, a bill for an account is proper, and relief will be granted if the case is one for which the discovery is necessary, notwithstanding the account is on one side, or the matters involved are purely legal. The Court, having acquired jurisdiction, will retain it for complete relief and to prevent a multiplictiy of suits. The right to discovery carries with it the right to relief, because, when the relief is sought in the shape of an account, courts of law and equity have concurrent jurisdiction."
>
> 1 Cyc., p. 421, e.

Opposing counsel below, in denying the jurisdiction in equity, thought that, inasmuch as a statute of Mississippi gives parties the right to a discovery in actions at law, there could be no resort to a court of equity for such purpose. The statute is as follows:

> "The court in which any action or suit is pending may, on good cause shown, and after notice of the application to the opposite party, order either party to give to the other, within a specified time, and on such terms as may be imposed, an inspection and copy, or permission to take a copy, of any books, papers or documents in his possession, or under his control, containing evidence relating to the merits of the action or proceeding or of the defense thereto; and, if compliance with such order be refused, such books, papers or documents shall not be given in evidence in the action or proceeding by the party so refusing; and the Court may punish the recusant party as for a contempt of court; and, if a complainant or plaintiff fails to comply with such order, the Court may, on motion, give the like judgment for the defendant as in cases or nonsuit or dismissal; and, if a defendant fails to comply with such order, the Court may, on motion, give judgment or decree against him by default or confession."
>
> Section 1003 of Code of Mississippi, 1906.

It will be observed that this section of the Code grants judgment by default for failure to produce the books in court; but, as petitioner does not know the amount of her damage without a discovery, she could not know for what sum to take judgment by default, and, in the very nature of things, could not know.

For this reason she seeks a discovery in equity of the extent to which the dredging has gone, for this knowledge

is entirely and peculiarly within the knowledge of respondents, and without it she is helpless. A judgment by default under Section 1003 of the Mississippi Code, if the desired information were not forthcoming, would be for an unknown and unknowable sum. Wherefore, a discovery is essential.

Besides, it has never been considered that the enlargement of a legal remedy destroyed one already existing in equity, aside from which, it may be remarked, that the statutory remedy would be of little avail in the peculiar circumstances of this case. For how could this petitioner formulate a demand at law based upon facts known only to the respondents?

Upon the whole record, it is submitted that the decree brought here by *certiorari* ought to be avoided and reversed and the Circuit Court of Appeals directed to remand the cause to the District Court with instructions to overrule the demurrer, else to dismiss the bill without prejudice.

Respectfully submitted,

PERCY BELL,
T. M. MILLER,
Attorneys for Petitioner.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1913.

No. 271.

KATE C. ARCHER, PETITIONER,

vs.

GREENVILLE SAND & GRAVEL COMPANY ET AL., RESPONDENTS.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF FOR RESPONDENTS.

JOHN W. YERKES,
Attorney for Respondents.

GEORGE E. HAMILTON,
JOHN J. HAMILTON,
Of Counsel.

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Authorities Cited.

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BRIEF FOR RESPONDENTS.

Statement.

The petitioner, Kate C. Archer (hereinafter called plaintiff), filed her bill of complaint in the proper chancery court of the State of Mississippi against the respondents, each a corporation created and existing under the laws of the State of Kentucky, alleging that she was the owner of cer-

tain lands set out in the bill, fronting on the Mississippi River, in the State aforesaid; that by virtue of riparian ownership her right and title extended, under the laws of that State, to the thread of the stream; that between this thread and the shore there were valuable deposits of sand and gravel, which were her property; that the defendants were dredging this sand and gravel from the bed of the river in front of her lands; that they refused to make compensation to plaintiff or to cease dredging. She prayed a discovery and accounting for the sand and gravel taken, and for an injunction at the final hearing.

Defendants removed the cause to the Circuit Court of the United States, and in that court demurred to the bill, chiefly because there was no ground for equitable relief, and that plaintiff had no title beyond low-water mark, under the laws of Mississippi, to the lands extending under the river, and no title to the sand and gravel therein.

On hearing, this demurrer was sustained, without opinion, and plaintiff having declined to amend, her bill was dismissed.

On appeal to the United States Circuit Court of Appeals, Fifth Circuit, the decree of the trial court dismissing the bill was affirmed, petition for rehearing overruled, and the cause is now before this court on certiorari.

ARGUMENT.

The two principal questions of law raised by the demurrer sustained herein below, and to be considered now, are:

First. Whether this suit can be sustained in equity.

Second. Though equitable jurisdiction exist, has plaintiff such title to, and ownership of, the sand and gravel dredged in the bed of the Mississippi River as will sustain the action?

FIRST.

The Bill in Equity Cannot Be Sustained Because Plaintiff Has a Plain, Adequate and Complete Remedy At Law, and There Is No Ground For Equitable Relief.

A.

Under section 723, Revised Statutes (the law controlling in 1910, when the bill herein was filed), and reaffirmed in the Judicial Code, section 267:

> "Suits in equity shall not be sustained in either of the courts of the United States in any case where a plain, adequate and complete remedy may be had at law."

The bill discloses the fact that the remedy at law, through an ordinary suit for damages, would be a plain, adequate, and complete remedy if plain-

tiff is entitled to any recovery against the defendants, and the processes and procedure at law are ample and sufficient for the maintenance of any right plaintiff may have against defendants.

The bill seeks:

1. Discovery and relief.
2. An accounting.
3. An injunction.

1.

The plaintiff seeks and prays not only discovery of the amount of sand and gravel taken, to whom sold, and prices received, but for enforcement of "the payment by the defendants to complainant of the money received by said defendants for the sale of said sand and gravel" (Rec., p. 4).

Bills of discovery, properly so-called are ancillary to, and in aid of, a suit at law, and the jurisdiction of courts of equity over bills for discovery and for discovery and relief was based principally upon the fact that the plaintiff in the bill had no means of compelling in a court of law discovery from his opponent of the facts necessary to a right presentation and maintenance of his cause.

Now, however, since by statutory enactments Federal and State parties to a suit at law may be summoned into court, and examined by the opposing party, and production of books, documents and records for inspection and use at any time may be required on application and motion, bills of dis-

covery are no longer necessary in equity, for the remedy at law is adequate and complete.

In *Rindskopf vs. Platto*, 29 Fed. Rep., 130, at page 133, the court, after quoting from the act of July 2, 1864, section 858, Revised Statutes, which provides that no witness shall be excluded in any civil action because he is a party to, or interested in, the issue tried, and therefore a party to a suit may be compelled by the adverse party to disclose all facts within his knowledge touching the controversy, and after quoting from the decision of this court in Brown *vs.* Swann, 10 Peters, 497, says:

> "As is obvious, this decision of the Supreme Court is directly applicable to the case at bar. What is sought by this bill is a discovery, by the defendant, of certain facts which it is believed are in his possession, and within his knowledge. All that would be accomplished if this bill were to be maintained, and a decree for a discovery made, would be a disclosure of those facts by the defendant. In the suit at law, as the present statutes of the United States provide, the defendant may be called as a witness, may be just as effectually examined as any other witness, and may be compelled to make just as complete a discovery as, in the absence of this statute, he could be compelled to make under a bill of discovery.
>
> "This being so, it follows that this bill is not maintainable. The demurrer will therefore be sustained, and the bill dismissed."

In *Drexel et al. vs. Berney*, executor, 14 Fed. Rep., 268, the court said:

> "Even if formerly the complainant might have been entitled to a discovery, now that parties can be examined in the same manner as other witnesses, at the instance of the adverse party, there is no necessity for such relief. Heater *vs.* Erie R. Co., 9 Blatchf., 316; Markey *vs.* Mut. Benefit L. Ins. Co., 3 Law & Eq. Rep. (1st Cir.), 647. The jurisdiction of a court of equity in this regard rests upon the inability of the common-law courts to obtain or compel the testimony sought, and when it can be obtained by the process of the latter it is an abuse of the powers of chancery to interfere. Brown *vs.* Swan, 10 Peters, 497.
>
> "The demurrer is allowed."

In *Ex Parte Robert Boyd*, petitioner, 105 U. S., 647, at pages 657, 658, opinion delivered by Mr. Justice Matthews, we find the following clear and forceful discussion of this subject:

> "It follows, then, that although at one time courts of equity would entertain bills of discovery, in aid of executions at law, because courts of law were not armed with adequate powers to execute their own process, yet the moment those powers were sufficiently enlarged, by competent authority, to accomplish the same beneficial result, the jurisdiction in equity, if it did not cease as unwarranted, would, at least, become inoperative and obsolete. A bill in equity to compel disclosures from a plaintiff or a defendant, of matters of fact peculiarly within his

knowledge, essential to the maintenance of the legal rights of either in a pending suit at law, would scarcely be resorted to, unless under special circumstances, now, when parties are competent witnesses, and can be compelled to answer, under oath, all relevant interrogatories properly exhibited; nor to compel the production of books, deeds, or other documents, important as instruments of evidence, when the court of law, in which the suit is pending, is authorized by summary proceedings to enforce the same right.

"But even conceding that such enlargements of the powers of courts of law do not deprive courts of equity of jurisdiction theretofore exercised, no one has ever supposed that they were illegitimate intrusions upon the exclusive domain of equity, or produced any confusion of boundaries between the two systems. No one has ever questioned the authority of Congress to make parties to a suit competent witnesses, or to confer upon courts of law power to compel the production of books and papers, because discovery was an ancient head of equitable jurisdiction. It is the very office of the principle of equity to supply defects in the law, and it is not to be regarded as anomalous that the technical law should, in the course of its necessary development, incorporate into its own organization, improvements in procedure, first introduced as equitable remedies. It is this very capacity of parallel growth that constitutes and perpetuates the harmonious coexistence of the two departments of our jurisprudence. Its history furnishes many examples and illustrations of this tendency and of its results."

Ellis *vs.* Davis, 109 U. S., 485.
Root *vs.* R. R. Co., 105 U. S., 189.

If, however, right enlargement of the powers of courts of law does not deprive courts of equity of jurisdiction theretofore exercised, yet, if by such enlargement, a party has now at law a plain, adequate and complete remedy, not previously existing, the question immediately arises, will not the party, under the provisions of the statute above quoted, be required by the court to make use of this plain, adequate and complete remedy, and allow a jury to pass upon the questions involved in this case rather than the chancellor.

In addition to the right of plaintiff to call as witnesses into a court of law the defendants, their officials and employees, section 1003, Mississippi Code of 1906, confers most ample power upon the court in which an action is pending to require the production of books, papers, etc., and is in words as follows:

> "1003. (927) Copy of Books, Papers or Documents Furnished (Laws 1900, ch. 97). The court in which any action or suit is pending may, on good cause shown, and after notice of the application to the opposite party, order either party to give to the other, within a specified time, and on such terms as may be imposed, an inspection and copy, or permission to take a copy, of any books, papers, or documents in his possession, or under his control, containing evidence relating to the merits of the action or proceeding or of the defense thereto; and if compliance with such order be refused, such books, papers or documents shall not be

> given in evidence in the action or proceeding by the party so refusing; and the court may punish the recusant party as for a contempt of court; and if a complainant or plaintiff fails to comply with such order, the court may, on motion, give the like judgment for the defendant as in cases of non-suit or dismissal; and if a defendant fails to comply with such order, the court may, on motion, give the judgment or decree against him by default or confession."

The relief sought by plaintiff in connection with discovery, namely, payment of the moneys received by the defendants for the sale of the sand and gravel dredged, would be no greater, broader or more certain if decreed by a chancellor than if found in a verdict of a jury and the judgment of the court thereon.

2.

The bill prays an accounting, but fails utterly to contain allegations sufficient to support the prayer or to disclose facts necessary to obtain the equitable remedy of accounting. Equitable jurisdiction as to accounting rests only upon these grounds:

(1) Complicated character of the account.
(2) Need of a discovery.
(3) The existence of fiduciary or trust relations.

One of these grounds must certainly exist and be declared in the bill. The argument has been pre-

sented that there is no need of discovery, and certainly it cannot be claimed that the account (which is not mutual) is intricate or complicated, or that any fiduciary relationship exists between plaintiff and defendants.

In *Fowle vs. Lawrason*, 5 Peters, 495, at page 503, this court, speaking through Mr. Chief Justice Marshall, said:

> "Although the line may not be drawn with absolute precision, yet it may be safely affirmed that a court of chancery cannot draw to itself every transaction between individuals in which an account between parties is to be adjusted. In all cases in which an action of account would be the proper remedy at law, and in all cases where a trustee is a party, the jurisdiction of a court of equity is undoubted. It is the appropriate tribunal. But in transactions not of this peculiar character, great complexity ought to exist in the accounts, or some difficulty at law should interpose, some discovery should be required, in order *to induce* a court of chancery to exercise jurisdiction."

3.

INJUNCTION.

The plaintiff did not pray that a preliminary injunction be issued to restrain a continuing trespass but prayed "that upon the hearing of this cause this honorable court will issue its gracious injunc-

tion, restraining the said defendants, their servants, agents, representatives and employees from further trespassing upon, or dredging from, the said lands of the said plaintiff."

The injunction sought is to be a part of the final decree to be granted only after the rights of the parties have been finally adjudicated, and the ownership of, and title to, the sand and gravel in question decided in plaintiff's favor. The dredging might have ceased long before the final hearing.

There is no allegation in the bill upon which a temporary or interlocutory injunction could be based, and the mere possibility that a permanent injunction might be made a part of the final decree is not sufficient to give equitable jurisdiction, and unless the case is for other and recognized reasons properly within equitable jurisdiction, this will not draw that jurisdiction to it. If, in a trial at law, plaintiff established her ownership and title to the bed of the stream and consequent ownership of the sand and gravel taken, and after this determination of property rights defendants should renew or continue dredging, a court of equity then might grant an injunction if it appeared the damage to plaintiff was irreparable, or there was a question of the solvency of defendants, or a possibility of multiplicity of suits, or that there was no complete and adequate remedy at law.

The authorities cited in brief for plaintiff (pp. 16, 17) would be of weight if a preliminary injunction had been sought.

SECOND.

Though Equitable Jurisdiction Exist, Plaintiff Has No Title To, and Ownership Of, the Sand and Gravel Dredged In the Bed of the Mississippi River By Defendants.

The position of counsel for petitioner is:

1. Under two decisions of the High Court of Errors and Appeals of Mississippi, rendered respectively in 1844 and 1860, Morgan & Harrison *vs.* Reading, 3 S. & M., 366, and Magnolia *vs.* Marshall, 39 Miss., 113, the law was established for that Commonwealth that the rights of a riparian owner along the Mississippi River are determined according to the common law, and a front proprietor, on streams not deemed navigable because above tide water, owns to the thread of the channel.

2. The right of property between high and low water mark is a corollary of the propositon that the proprietor's ownership extends to the thread of the channel.

3. Under the decisions of this court, the effect of grants of land bordered by streams, whether navigable or not, is to be determined by the law of the State in which the land is located.

We differ respectfully but absolutely from the position taken by counsel in the first proposition, and claim with confidence that the High Court of

Errors and Appeals in the two cases cited decided one single proposition, and only one, namely, "that the riparian proprietor on the Mississippi owns at least to low-water mark," and did not establish a rule of property as to the bed of the stream.

The facts in these two cases were identical, and called for nothing more than the decision of this one point, and nothing more in the opinions has the "force of judicial determination."

Before considering these State cases, and in connection with claim of plaintiff's counsel, that under them the right of plaintiff to ownership extended to the thread of the channel, we quote from three decisions of this court (because of directness of application), which clearly decide that no opinion can be relied upon as binding authority unless the case called for the expression of that opinion.

In *United States vs. County of Clark*, 96 U. S., 211, at pages 217, 218, the court, referring to a decision of the Supreme Court of the State, and which decision had been cited as sustaining a certain construction of the State statute, said:

> "This was the only question before the court, and the decison is authority only to the extent of the case before it. The court does not appear to have decided that the county court could not levy a general tax for the expenses and liabilities of the county. It was only called upon to consider how far an extraordinary or special tax could be levied. The case called for nothing more, and, if more was intended by the judge who delivered the opinion, it was purely *obiter*."

In *Bardes vs. Hawarden Bank*, 178 U. S., 524, at page 534, the court says:

> "Moreover, the only point necessary to the decision of that case was that this court had no power to issue a writ of prohibition to the District Court sitting in bankruptcy; much of Mr. Justice Story's opinion in favor of extending the jurisdiction of that court at the expense of the State courts is contrary to the subsequent adjudication of this court in *Peck vs. Jenness* (1849), 7 How., 612, and in a still later case this court, speaking by Mr. Justice Curtis, said that the two former cases 'are an illustration of the rule that any opinion given here or elsewhere cannot be relied on as a binding authority, unless the case called for its expression.' *Carroll vs. Carroll* (1853), 16 How., 275, 287."

In *McCormick Machine Co. vs. Aultman*, 169 U. S., 606, at page 611, the court, referring to certain cases that had been cited and relied upon by counsel, said:

> "In neither of these cases was this court called upon to decide the question which has been certified, and the expression of opinion in *Peck vs. Collins*, relied upon by the defendants, must be considered merely a *dictum*, and lacking the force of a judicial determination."

Returning to the State case, *supra* (the facts in the two cases being identical as stated by the court in its opinion in the second case, 39 Miss., at page

136), plaintiff in each action was a riparian proprietor at Vicksburg, Miss. As such, he had for years claimed and exercised ownership over his lot between high and low water marks, and collected wharfage from boats landing there and using this bank between high and low water marks, with charges for this use fixed, and in one case advertised. The owners of certain boats having used these bank landings, refused to pay the ordinary charges, and quoting from the agreed facts in the Magnolia case, 39 Miss., at page 116, "there was no use or occupation of plaintiff's land beyond high-water mark; *the only portion used and occupied being the bank of the river between high and low water mark.*" There was no artificial wharf where the steamer lay, but the plaintiff had graded the bank of the river at that point for the better accommodation of boats landing there; the bank was occupied by said steamboat for the purpose of taking on board a cargo of cotton, and for no other purpose. Following the court's statement of the agreed facts, and still on page 116, is this paragraph in the opinion:

> "The agreed state of facts in this record are almost identical with the case of Morgan & Harrison *vs.* Reading, 3 S. & M., 366, decided in this court. What are the rights of the riparian owners, and what the *jus publicum* incident to the free navigation of the Mississippi, are questions there discussed, and are the important questions here again presented."

Are we not justified, then, in insisting that the facts in this case and the statement of the court in its own opinion limit the binding authority of these opinions as judicial determinations to a decision of what are the rights of a riparian owner between high and low water marks as connected with the rights of the public in using the Mississippi River as a public highway and navigable stream. This question in no way is connected with ownership of the bed of the stream or ownership of the gravel and sand in the channel of the stream. The case called for nothing more than a decision as to these bank rights, and if more was intended by the judge who delivered the opinion, it was purely *obiter*.

In the Morgan case, 3 S. & M., at page 406, the court, after considering certain Federal Statutes, said:

> "It is by all these acts in effect declared that the navigation of navigable rivers shall be free to all without State interposition or individual interruption. No principle of the common law is materially changed, either in regard to the rights of the public or of the riparian owner. Or if these provisions do operate to produce any change, it can only extend to the bed of the river, *and not to the banks above low-water mark*. In view of all these acts of Congress, it has been decided in Alabama that in grants from the Government to individuals bounded on water courses, there is an implied exception of the bed of a fresh-water river beyond low-water mark. Bullock *vs.* Wilson, 2 Porter's

Reports, 436. Supposing this to be the true doctrine, it does not alter the case, because the bank was used above low-water mark. * * *"

Later in the opinion, and after citing a number of cases, the court continued on same page:

"The authorities cited establish the following conclusions:

"2. That there is a material difference between rivers which are navigable and those which are not navigable, according to the common-law meaning of the term. On rivers not navigable, the riparian proprietor, by construction of the common law, owns to the thread of the stream, unless restricted by the grant; and the bank being private property, subject to the exclusive appropriation of the owner, is not subject to the use of the public, although the river itself be a public highway, the use of which may not be interrupted by the owner.

"3. That as the bank cannot be used without the consent of the owner, he may require satisfaction, and if he has published his terms, which are known to anyone using the bank, it amounts to an implied promise to pay.

" '*It is not necessary to say more than was said in the case in Alabama, that the riparian proprietor on the Mississippi owns at least to low-water mark.* By an application of these conclusions to the case at bar, it is plain that the plaintiffs in error are not entitled to judgment. They claim something more than a right to use the bank as an incident to navigation. They took possession and held it for four months, which was an

> interruption to navigation and an actual appropriation of the bank to their private use, not justified even by the civil law.' "

Although in this opinion the highest court of Mississippi held clearly to the old doctrine discarded by this court and by various State courts that a river is navigable in the technical sense only as high up from its mouth as the tide flows, yet the entire decision is based exclusively upon bank rights, and finally decides the single proposition that the riparian proprietor on the Mississippi owns at least to low-water mark. The binding force and authority of this opinion cannot be extended in view of the facts which the court was called upon to consider, and in view of the limiting words found in the opinion itself, and because under the Federal Constitution and statutes this great stream is a public highway, a passageway of commerce, a change of the common-law rules of bed ownership is necessary.

The same rule must be applied to the second decision, *supra*, for the facts in this case were admitted to be identical with those in the Morgan case, and Judge Harris, delivering the opinion of the court, after occupying some twenty pages in attacking the opinion of Chief Justice Tilghman, of Pennsylvania, who had decided that in this country the common-law rule of navigability as determined by the ebb and flow of the tide was inapplicable, and that a navigable river was one

that was navigable in fact and actually navigated by large boats, closes the opinion with these words:

> "The case now before us falls under the principles of Morgan *et al. vs.* Reading, 3 S. & M., and is indeed the identical same case.
>
> "Let the judgment be affirmed."

A concurring opinion, written by Mr. Justice Handy, is very brief and well worth considering:

> "Without assenting to all the views taken in the above opinion, I concur in the result of it that the judgment should be affirmed."

In view of the language used in the Morgan case, *supra*, it is proper to notice the Alabama decision referred to, for though it is followed by the Mississippi court as authority in determining bank rights, this opinion was in agreement with Pennsylvania decisions with regard to bed ownership. In this case (Bullock *vs.* Wilson, volume 2, Porter's Reports, Alabama, 436), Wilson had entered certain lands on the Coosa River, and claimed as appurtenant thereto a mill erected in the bed of the river in front of the lands he had entered and before his entry; that being the owner of the land fronting on the river, he owned to the center of the stream.

At page 448, and after referring to the common-law rule with regard to the ebb and flow of water determining the navigability of a stream, the court said:

> "It is very obvious, however, that, with us, the question does not depend on the tide, or fresh water; that if the river has been expressly recognized as a public highway by the Federal and State governments; or even if it be of sufficient width and depth, and suited to the ordinary purposes of navigation, and the Government has not expressly granted any part of the bed, or computed it in the quantity granted, which implies an exception, as in case of navigable water, the stream is thereby constituted a public highway, and no individual can assert any private right of soil in the bed *beyond the low-water mark.* * * * It results from what has been said that Wilson could not sustain his title to a mill erected by himself in the bed of the river beyond low-water mark. If he could not otherwise, the circumstance of his having inserted the mudsills, or any other part of the house, or dam, into the bank, so as to attach the mill to his soil, would not improve his title below the mark. Then it follows irresistibly that the fact of another having done the work cannot extend his title. In either case the law could only recognize his title to so much of the building or works as came within his line. Therefore in this case the plaintiff below could have had a right to recover only so much of the mudsills, or other parts of the mill building, or appurtenances, as were actually situated within his boundary, fixing it at the natural low-water mark."

We insist that the high court of Mississippi did not decide that ownership of riparian rights includes, and carries with it, ownership of the bed

of the stream to its thread, and this for three reasons:

1. The question of ownership of the bed of stream was not before the court for consideration and decision.

2. The Mississippi court relied upon and cited as authority to sustain its decision as to riparian rights an opinion of the highest court of Alabama, in which that court distinctly held that no individual can assert any private right of soil in the bed beyond the low-water mark.

3. The Mississippi court only decided "that the riparian proprietor on the Mississippi owns at least to low-water mark."

In the voluntary and necessarily gratuitous argument (because not germane to the question before the court) made by the court in the *Morgan* case, *supra*, in support of the common-law doctrine as to the ebb and flow of the tide constituting a navigable stream, the court was in direct opposition and antagonism to the reasoning and opinion of this court in the frequently cited and approved case of *The Genesee Chief*, 12 How., 443, decided in 1851, nine years before the opinion of the State court was handed down.

2.

The second proposition of counsel that the right of property between high and low water mark is a corollary of the proposition that the proprietor's

ownership extends to the thread of the channel, is not, as we understand it, supported by the authorities, which differentiate distinctly between those rights which are admittedly riparian, and rights of ownership of or to the bed of the river.

In *Lyon vs. Fishmongers Co.*, L. R., 1 App. Cases, 662, Lord Selborne said:

> "But as the rights of a riparian proprietor, so far as they relate to any natural stream, exist *jure naturæ*, because his land has, by nature, the advantage of being washed by the stream; and if the facts of nature constitute the foundation of the right, I am unable to see why the law should not recognize and follow the course of nature in every part of the same stream. * * * With respect to the ownership of the bed of the river, this cannot be the natural foundation of riparian rights properly so called, because the word 'riparian' is relative to the bank, and not the bed of the stream, and the connection, when it exists, of property on the bank with property in the bed of the stream depends, not upon nature, but on grant or presumption of law."

In *Delaplaine vs. Chicago & Northwestern Ry. Co.*, 42 Wis., 214, 226, 227, the principle is stated thus:

> "In other words, according to the uniform doctrine of the best authorities, the foundation of riparian rights, *ex vi termini*, is the ownership of the bank or shore. In such ownership they have their origin. *They*

> *may and do exist though the fee in the bed of the river or lake be in the State.* If the proprietor owns the bed of the stream or lake, this may possibly give him some additional right; but his riparian rights, strictly speaking, do not depend on that fact."

Again, the same court said in *Diedrich vs. Railroad Co.*, 42 Wis., 248, at page 262:

> "Second. Riparian rights proper are held to rest upon title to the bank of the water, and not upon the title to the soil under the water; riparian rights proper being the same, whether the riparian owner owns the soil under the water or not."

In *Indianapolis Water Co. vs. American Co.*, 53 Fed. Rep., 970, 974, the court said:

> "It has been well said that the rights of a riparian proprietor, so far as they relate to any natural stream, exist *jure naturæ*, because his land has by nature the advantage of being washed by the stream; and, as the facts of nature constitute the foundation of the right, the law should recognize and follow the course of nature in every part of the same stream. The ownership of the bed of the river is not the foundation of 'riparian rights' properly so called, because the word 'riparian' is relative to the bank, and not to the bed, of the stream; and the connection, when it exists, of property on the banks with property in the bed of the stream, depends, not upon nature, but upon grant or prescription."

Citing as authority the Fishmonger case, *supra*.

In *Yates vs. Milwaukee*, 10 Wall., 497, where the rights of a riparian owner of a lot bounded by a navigable stream were being considered, Mr. Justice Miller, delivering the opinion of the court, said (pages 503, 504):

> "As to the first of these propositions, it does not seem to be necessary to decide whether the title of the lot extends to the thread of the channel of the river, though if the soil was originally part of the public lands of the United States, as seems probable, the case of The Railroad Company *vs.* Schurmier, would limit the title to the margin of the stream.
>
> "But whether the title of the owner of such a lot extends beyond the dry land or not, he is certainly entitled to the rights of a riparian proprietor whose land is bounded by a navigable stream; and among those rights are access to the navigable part of the river from the front of his lot, the right to make a landing, wharf or pier for his own use or for the use of the public, subject to such general rules and regulations as the legislature may see proper to impose for the protection of the rights of the public, whatever those may be. * * *
>
> "This riparian right is property, and is valuable, and, though it must be enjoyed in due subjection to the rights of the public, it cannot be arbitrarily or capriciously destroyed or impaired."

The lands owned by the plaintiff herein were originally the property of the United States.

In the case of *Railroad Company vs. Schurmier,*

7 Wall., 272, the question before the court involved the rights of riparian proprietors on the Mississippi River in the State of Minnesota, and this court, after referring to the *Genesee Chief* decision and to the acts of Congress, declaring that navigable rivers were public highways, said, at pages 288, 289:

> "Viewed in the light of these considerations, the court does not hesitate to decide, that Congress, in making a distinction between streams navigable and those not navigable, intended to provide that the common-law rules of riparian ownership should apply to lands bordering on the latter, but that the title to lands bordering on navigable streams should stop at the stream, and that all such streams should be deemed to be, and remain public highways.
>
> "Although such riparian proprietors are limited to the stream, still they also have the same right to construct suitable landings and wharves, for the convenience of commerce and navigation, as is accorded riparian proprietors bordering on navigable waters affected by the ebb and flow of the tide."

In all of these decisions, the rights of riparian owners are considered, defined and affirmed, irrespective of whether the ownership of the bed of the stream be in the State, in the King, or another individual.

The Mississippi court, in upholding and affirming the rights of riparian owners on the Mississippi

to construct landings on their river fronts for theirown useor the usesof thoseengaged in navigation, was in absolute accord with decisions of this court and other courts, that, irrespective of ownership of the bed of the stream, the riparian proprietor possessed the rights claimed and exercised by the plaintiffs in the cases at its bar, such occupation and use being subject, of course, to the paramount rights of the Federal Government under the Constitution and under Federal statutes, conferring supreme power over these public highways with regard to navigation.

6.

The proposition of law stated by counsel for plaintiff (Brief, page 5), that "the construction of a grant of lands bordering upon a navigable stream is left to the courts of the several States" and "by the decisions of the highest court in Mississippi a grant of lands bounded by waters of a navigable stream above tide water extends to the thread of the channel" is only partially correct.

The lands owned by Mrs. Archer were originally public lands, and this court has distinctly held that grants of the Government on navigable streams extend only to the limits of high water.

In *Barney vs. Keokuk*, 94 U. S., 324, at page 338, the court said:

> "And since this court, in the case of *The Genesee Chief*, 12 How., 443, has declared that the Great Lakes and other navigable

> waters of the country, above as well as below the flow of the tide, are, in the strictest sense, entitled to the denomination of navigable waters, and amenable to the admiralty jurisdiction, there seems to be no sound reason for adhering to the old rule as to the proprietorship of the beds and shores of such waters. It properly belongs to the States by their inherent sovereignty, and the United States has wisely abstained from extending (if it could extend) its survey and grants beyond the limits of high water."

And in *Packer vs. Bird*, 137 U. S., 661, the court again, at page 669, declared the rule in the following language:

> "The courts of the United States will construe the grants of the General Government without reference to the rules of construction adopted by the States for their grants; but whatever incidents or rights attach to the ownership of property conveyed by the Government will be determined by the States, subject to the condition that their rules do not impair the efficacy of the grants or the use and enjoyment of the property by the grantee. *As an incident of such ownership the right of the riparian owner, where the waters are above the influence of the tide, will be limited according to the law of the State, either to low or high water mark, or will extend to the middle of the stream.*"

But under no circumstances is this title more than a mere technical title.

"Whatever the nature of the interest of a riparian owner in the submerged lands in front of his upland bordering on a public navigable water, his title is not as full and complete as his title to fast land which has no direct connection with the navigation of such water. It is a qualified title, a bare technical title, not at his absolute disposal, as is his upland, but to be held at all times subordinate to such use of the submerged lands and of the waters flowing over them as may be consistent with or demanded by the public right of navigation."

Scranton vs. Wheeler, 179 U. S., 141-163.

"The technical title to the beds of the navigable rivers of the United States is either in the States in which the rivers are situated, or in the owners of the land bordering upon such rivers. Whether in one or the other is a question of local law."

United States vs. Chandler Co., 229 U. S., 53-60.

The original title from high-water mark to the thread of the Mississippi was in the State, with power in the Commonwealth to confer by law upon the adjacent land owner a technical qualified ownership in the bed or banks, one or both, of the stream. That qualified ownership might extend from high-water mark to low-water mark, from high-water mark to the thread of the stream, or from low-water mark to the thread of the stream, the power of the State to vest this technical title in the adjacent land owner being sufficient to vest all

or any portion that in its judgment it thought proper.

Consideration of the allegations of the bill in connection with the muniments of title exhibited to the court as exhibits suggests possible failure to plead such title in plaintiff as would carry with it even the qualified ownership in the bed of the stream just discussed. Though the bill alleges that the lands owned by Mrs. Archer, former K. C. Deaton, lie west of the levee, along the river front, in said county, and fronting on the said Mississippi River, excepting certain lots or parcels (Rec., p. 3), a reading of the deed under which plaintiff holds (Rec., p. 9) discloses that the river is not named in said deed as a boundary of her lands, nor is there any statement therein showing that these lands front upon the Mississippi River, the simple statement being that they "lie west of the public levee as at present located," and an examination of the other deeds exhibited to the court in her chain of title are indefinite in description, and except not only various lots previously sold and conveyed, but also so much of said land as has caved into the Mississippi River (Rec., pp. 6, 7, 8). Certainly the title to those portions that had caved in did not pass to the grantee, and if the contention of counsel for petitioner is correct, does not that portion of the bed of the river belong to someone other than petitioner, and does it not intervene between petitioner's holdings and the thread of the stream.

There is such want of definiteness of allegation of necessary ownership, and this indefiniteness made the more apparent and certain by the deeds filed, that again it seems clear the court below did not err in sustaining the demurrer interposed by defendants.

If in error on this proposition, certainly in this day it would not be reasonable, scarcely rational, for either the Commonwealth or an individual to claim such absolute ownership and title of the bed or banks of a navigable stream above the flow of the tide as existed at common law in waters called non-navigable.

Whatever rights may be claimed by these owners are subordinate to the dominant public right, and whatever rights a State may vest in the adjoining land owner are again subordinate to these public rights.

"Navigation is commerce;" the Mississippi River, once an international boundary between illustrious foreign powers, and now the great intraterritorial stream of this Nation, navigable for full seven or eight hundred miles above the flow of the tide, is a national public highway, and all rights of adjoining land owners are subject to Federal control in regulating commerce, whether this control be founded on the commerce clause of the Federal instrument or on laws enacted by the Federal Congress. Under these laws the plaintiff could not have dredged this sand and gravel in the bed of the river, though in front of her lands, and

between the bank and the thread of the stream, except under the approval and authorization of the Secretary of War, for section 7, of "An act making appropriations for the construction, repair and preservation of certain public works on rivers and harbors, and for other purposes," approved September 19, 1890, Statutes at Large, volume XXVI, page 454, makes it unlawful for any person to excavate or fill, or in any manner to alter or modify, the course, location, condition or capacity of the channel of said navigable water of the United States unless approved and authorized by the Secretary of War.

Could these defendants, though authorized and empowered by the plaintiff to do this dredging, have so done without authority from the Secretary of War? And further, irrespective of any wish, desire or act on the part of the plaintiff, the dredging of this channel could be legally done by the authority of the Secretary.

If the dredging were done by the authority of the Secretary, would it in law be a trespass upon the property of plaintiff, and in view of the broad and comprehensive powers of the Federal Government over navigable streams, and in the face of the direct language of the statute quoted, would a bill or suit at law state a cause of action in connection with the facts alleged in the bill unless there was the further allegation that the dredging of the channel was not authorized or approved by the Secretary of War?

Could the court below assume that extensive and continued dredging, as alleged in the bill, affecting necessarily the channel of the river, would be undertaken by defendants without proper authorization and authority, or that the proper officials of the Government would have allowed these operations to continue?

The character of title, the quality and quantity of ownership of the State or adjacent land owner, in the bed of a navigable stream, differ so widely and radically from title and ownership of the bed of a non-navigable stream, and by non-navigable is meant non-navigable in fact, that the legal principles applying and controlling in the one case do not reach or affect the other.

CONCLUSION.

Petitioner insists that certain language used, and argument made, in the opinion of a State court, and this language and argument not called for by the case at its bar, and the argument made, and deductions therefrom directly in conflict with the decisions of this Court, is binding authority and judicial determination by the State court.

On the other hand, we ask this Court to limit the State decisions as a judicial determination to the extent of the case that was before that court, and in so doing the State decisions will be in fullest harmony with the decisions of this Court.

The two decisions relied upon by counsel for plaintiff stand out distinctly and strikingly as

> "an illustration of the rule that any opinion given here or elsewhere cannot be relied on as binding authority unless the case called for its expression."
>
> Carroll *vs.* Carroll, 16 How., 275-287.

We submit there was no error in the decree entered below, and respectfully ask that it be affirmed.

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